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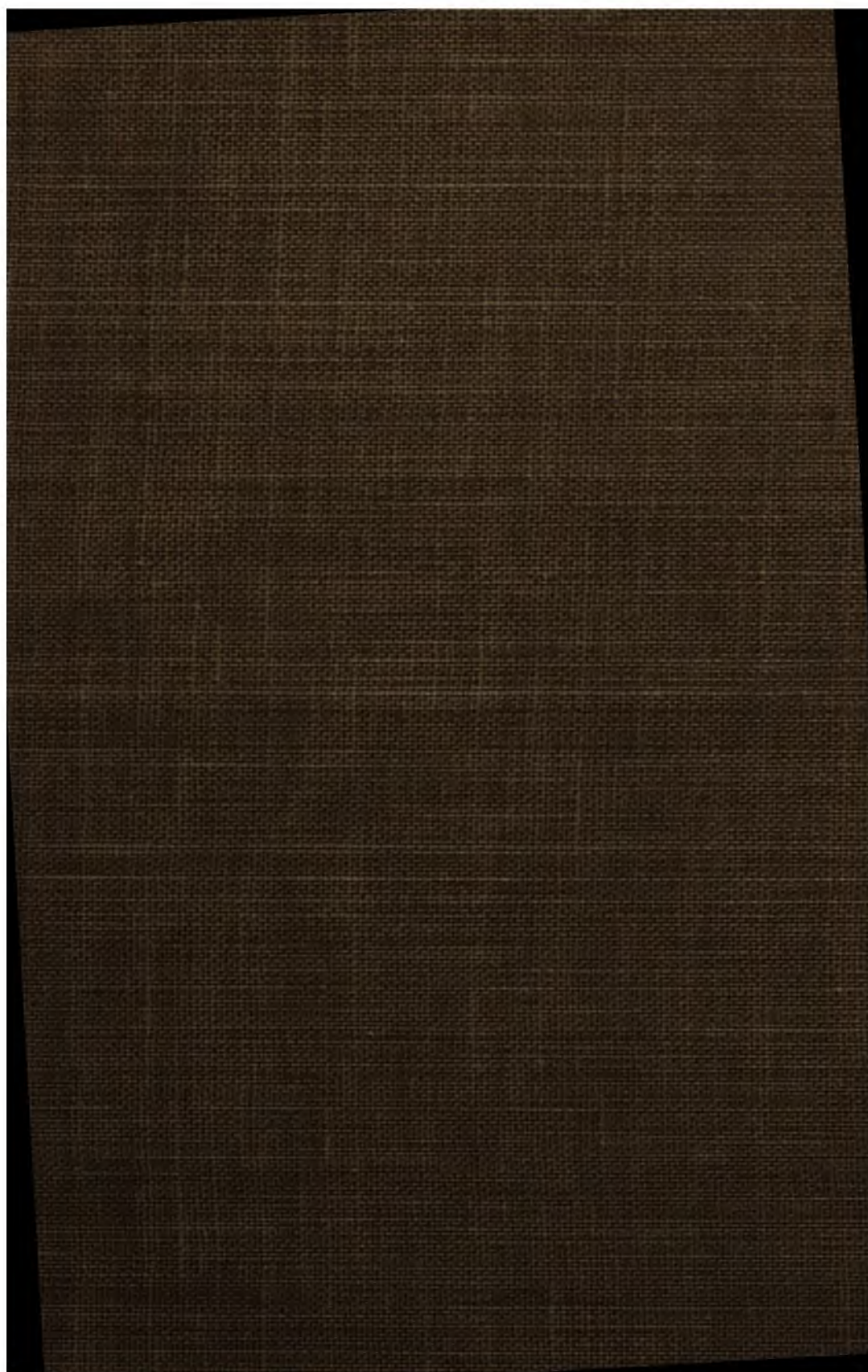
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REPORTS OF DECISIONS

OF THE

SUPREME COURT

OF THE

STATE OF NEVADA.

BY

HON. THOMAS P. HAWLEY,
CHIEF JUSTICE.

PUBLICATION AUTHORIZED BY THE SUPREME COURT OF THE
STATE OF NEVADA.

VOLUMES I. AND II.

SAN FRANCISCO:

A. L. BANCROFT AND COMPANY,
LAW BOOK PUBLISHERS, BOOKSELLERS AND STATIONERS.

1877.



Entered according to Act of Congress, in the year 1877,
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PREFACE.

THIS volume contains the opinions of the Supreme Court of the State of Nevada as published in volumes 1 and 2 Nevada Reports; it having been deemed advisable, owing to the scarcity of said volumes, to republish said decisions.

In condensing these volumes into one, the briefs of counsel are necessarily omitted. The statements of facts, when not embodied in the opinions of the court, are briefly set forth. The head-notes have been revised and rearranged, and references are added showing in what other cases in this State the principle decided has been commented upon, affirmed, or overruled. The paging of the original Reports will be found at the head of each case and on the margin of each page.

I have endeavored to present this work in such shape as to merit the approval of the Bench and Bar.

THOMAS P. HAWLEY.

CARSON CITY, NEVADA,
January 1, 1877.

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JUSTICES OF THE SUPREME COURT,
1865-6.

HON. JAMES F. LEWIS CHIEF JUSTICE.
HON. H. O. BEATTY }
HON. C. M. BROSNAN } ASSOCIATE JUSTICES.

OFFICERS OF THE COURT.

HON. GEORGE A. NOURSE ATTORNEY-GENERAL.
ALFRED HELM CLERK.

JUDGES OF THE TERRITORIAL COURT OF NEVADA.

FIRST DISTRICT HON. J. W. NORTH.
SECOND DISTRICT..... HON. GEORGE TURNER.
THIRD DISTRICT..... HON. P. B. LOCKE.

DISTRICT JUDGES OF THE STATE OF NEVADA.

1865-6.

FIRST DISTRICT { HON. R. S. MESICK.
 HON. RICHARD RISING.
 HON. CALEB BURBANK.
SECOND DISTRICT..... HON. S. H. WRIGHT.
THIRD DISTRICT HON. W. HAYDON.
FOURTH DISTRICT HON. C. C. GOODWIN.
FIFTH DISTRICT HON. S. L. BAKER.
SIXTH DISTRICT HON. E. F. DUNN.
SEVENTH DISTRICT..... HON. WILLIAM H. BEATTY.
EIGHTH DISTRICT HON. DANIEL VIRGIN.
NINTH DISTRICT..... HON. S. H. CHASE.

TABLE OF CASES.

	PAGE
Abrams ads. McLane.....	716
Alford v. Dewin.....	172
Alford v. Bradeen	191
Armstrong ads. Paul.....	70
Armstrong v. Paul.....	109
Arnold v. Stevenson.....	748
 Bacon M. & M. Co. ads. Paxton.....	768
Bajazette and Golden Era G. & S. M. Co. ads. Hale & Norcross G. & S. M. Co.....	274
Ballard v. Purcell.....	290
Bassett ads. Carson River L. Co.....	760
Barstow & Goodman ads. Fox.....	521
Beck ads. Bowers.....	658
Beegan ads. Paul & Co.....	278
Blackburn ads. Low.....	588
Bladel ads. Keller.....	415, 680.
Bonds ads. People.....	31
Bonds ads. State.....	775
Bowers v. Beck.....	658
Bowker ads. Davis.....	410
Bradeen ads. Alford	191
Bromberger ads. Mitchell.....	513, 855
Brown v. Roberts.....	339
Brown v. Davis.....	346
Brubaker ads. Doak.....	183
Brumfield v. Commissioners of Douglas County.....	588
Bullion M. Co. ads. Choate & Brown.....	62
Bullion M. Co. ads. Scott	605
Bullion M. Co. v. Croesus G. & S. M. Co.....	687
Burling v. Goodman.....	266
Burning Moscow Co. ads. Hastings.....	616, 621
Burning Moscow Co. ads. Clark.....	619
Burning Moscow Co. ads. Virginia & Gold Hill M. Co.....	620
Burning Moscow Co. ads. Gillig & Mott.....	620
Burning Moscow Co. ads. Gillig	620
 California State Telegraph Co. v. Patterson.....	124
Carpenter v. Johnson & Waddell.....	281

	PAGE
Carpenter v. Clark	574
Carron River L. Co. v. Barnett	760
Cavanagh v. Wright	484
Champion v. Sessions	404, 781
Chase v. Savage & M. Co.	733
Chedle ads. Gibson	419
Cherry ads. Miller	683
Choate & Brown v. Bullion M. Co.	62
Chollar-Pomou & S. M. Co. ads. Virginia City	369
City of Virginia v. Chollar-Pomou & S. M. Co.	369
Clark v. Shannon	47
Clark v. Goldman	516
Clark ads. Carpenter	734
Clark v. Burning Moscow Co.	619
Cohn ads. Seawell	428
Collins ads. State ex rel. Daggett	459
Commissioners of Storey County ads. State ex rel. Nightingill	221
Commissioners of Washoe County ads. People ex rel. Flack	391
Commissioners of Pershing County ads. Trustees of School District No. 1	283
Commissioners of Douglas County ads. Brumfield	528
Confidence Co. & S. M. Co. ads. Henry	529
Corbett v. Rice	340
Cordell v. Frazell	196
Cox v. Smith	133
Cox ads. Fagitt	376
Crandall, Ex parte	250
Crossen Co. & S. M. Co. ads. Bullion M. Co.	687
Crosier v. McLaughlin & Fulton	296
Crosman v. Nightingill	274
Crown Point M. Co. ads. Low	599
Culbertson ads. McFarland	728
Curry ads. State ex rel. Haydon	266
Davis v. Thompson	17
Davis ads. Brown	346
Davis v. Bowker	410
Diamond v. Stone	320
Dewin ads. Alford	173
Dilley v. Sherman	591
Doak v. Brabaker	183
Dunlap ads. Gallagher	636
Earl ads. State	334
Easterbrook v. Upton	337
Edwards ads. Read	772
Empire Mill Co. ads. Killip	559
Epstein ads. Travis	94
Estate of Nicholson	433
Ex parte Crandall	250
Ex parte Jones	270

TABLE OF CASES.

xi

	PAGE
Ex parte Salge	379
Ex parte Smith	848
Fargo ads. Levey	349
Fowler v. Houston	398
Fox v. Barstow & Goodman	521
Frizell ads. Cordiell	106
Frothingham ads. Gregory	211
Fugitt x. Cox	876
Gallagher v. Dunlap	836
Gaylord ads. Runkle & Lichtenstein	100
Geller v. Huffaker	22
Geller & Raffer ads. Maples	195
Gerhauser ads. McClusky	571
Gibson v. Chedie	419
Gibson v. Milne	440
Giffin v. Smith	881
Gillig, Mott & Co. v. Independent G. & S. M. Co.	206
Gillig, Mott & Co. v. Lake Bigler R. Co.	727
Gillig & Mott v. Burning Moscow Co.	620
Gillig v. Burning Moscow Co.	620
Glasgow ads. Williams	447
Gleason ads. People	143
Goldman v. Clark	516
Goodman ads. Burling	266
Goodman ads. Fox	521
Gottshall v. Melsing	704
Gray v. Harrison	423
Gregory v. Frothingham	211
Hackett ads. Rhuling	308
Hale and Norcross G. & S. M. Co. v. Storey County	83
Hale and Norcross G. & S. M. Co. v. Bajazette and Golden Era G. & S. M. Co.	274
Hamilton v. Kneeland	37, 50
Harrison ads. Gray	423
Harvey v. Sides S. M. Co.	451
Hastings v. Johnson	523, 708
Hastings v. Burning Moscow Co.	616, 621
Haydon ads. Sawyer	64
Haydon v. Supervisors of Ormsby County	877
Haynes ads. Nosler	576
Henry v. Confidence G. & S. M. Co.	529
Hermann ads. Vesey	34
Hermann ads. Thornburgh	400
Hoopes v. Meyer	365
Houston ads. Fowler	398
Howard v. Richards & Richards	648
Huff ads. Van Valkenburg	115
Huffaker ads. Geller	22

	PAGE
Huguet v. Owen	395
Hyman v. Kelly	148
Independent G. & S. M. Co. ads. Gillig, Mott & Co.....	206
James ads. Mears	851
Janes, Ex parte	270
Johnson & Waddell ads. Carpenter	281
Johnson ads. Hastings	523, 703
Johnson ads. Maynard	541
Johnson ads. Walter	862
Jones & Colla v. O'Farrell, James & Co.....	302
Jones & Denton ads. Richardson	342
Keller v. Blasdel	413, 680
Kelly ads. Hyman	148
Kelly ads. State	188
Keyes ads. Lehane	867
Killip v. Empire M. Co.....	559
Kneeland ads. Hamilton	37, 50
Lake Bigler R. Co. ads. Gillig, Mott & Co.....	727
Lambert v. Moore	193, 293
Lambert v. McFarland	581
Lansing ads. Mackie	812
Lehane v. Keyes	867
Levey v. Fargo	349
Lobdell v. Simpson	783
Lockhart v. Mackie	804
Logan ads. People	89
Logan ads. State	427
Low v. Blackburn	593
Low v. Crown Point M. Co.....	599
Low v. Staples	723
Mackie ads. Lockhart	804
Mackie v. Lansing	812
Mullett v. Uncle Sam G. & S. M. Co.....	156
Maples v. Geller & Raffer ...	195
Maynard v. Newman	227
Maynard v. Johnson	541
Maynard v. Railey	823
McClusky v. Gerhauser	571
McDonald v. Prescott & Clark	629
McFarland v. Culbertson	788
McFarland ads. Lambert	581
McLane v. Abrams	716
McLaughlin & Fulton ads. Crosier	296
Meade ads. Zabriskie	793
Mears v. James	851
Melting ads. Gottschall	704

TABLE OF CASES.

xiii

	PAGE
Meyer ads. Hoopes	365
Miller v. Cherry	683
Milliken v. Sloat	481
Milne ads. Gibson	440
Mitchell v. Bromberger	513, 855
Monroe ads. Peran	408
Moore ads. Lambert	193, 293
Newman ads. Maynard	227
Nicholson, Estate of	433
Nightingill ads. Crossman	274
North American M. Co. ads. Smith	357
North American M. Co. ads. O'Meara	633
Noaler v. Haynes	576
Noyes ads. Sankey	58
O'Farrell, James & Co. ads. Jones & Colla	302
O'Farrell ads. Rhodes	583
Olin ads. Van Vliet	417
O'Meara v. North American M. Co.	633
O'Neale ads. Wick	813
Oreamuno v. Uncle Sam G. & S. M. Co.	179
Ormsby County ads. Waits	315
Owen ads. Huguet	395
Patterson ads. California State Telegraph Co.	124
Paul v. Armstrong	70
Paul ads. Armstrong	109
Paul & Co. v. Beegan	278
Paxton v. Bacon M. & M. Co.	768
People v. Bonds	31
People v. Gleason	143
People v. Logan	89
People v. Taylor	88
People ex rel. Flack v. Commissioners of Washoe County	391
Perau v. Monroe	408
Prescott & Clark ads. McDonald	629
Purcell ads. Ballard	290
Railey ads. Maynard	823
Read v. Edwards	772
Real del Monte G. & S. M. Co. ads. State	437
Rhodes v. O'Farrell	583
Rhulung v. Hackett	303
Rice ads. Corbett	810
Richards & Richards ads. Howard	648
Richardson v. Jones & Denton	342
Roberts ads. Brown	339
Bankie & Lichtenstein v. Gaylord	100

	PAGE
Sales ads. State.....	778
Salge, Ex parte.....	379
Salge ads. State.....	385, 831
Sankey v. Noyes.....	58
Savage S. M. Co. ads. Chase.....	533
Sawyer v. Haydon.....	64
Scott v. Bullion M. Co.....	605
Seawell v. Cohn.....	818
Session ads. Champion.....	404, 731
Shannon ads. Clark.....	477
Sharon v. Shaw.....	799
Shaw ads. Sharon.....	799
Sherman ads. Dilley.....	591
Sholes v. Stead & Hunt.....	627
Sides S. M. Co. ads. Harvey.....	451
Sigismund v. Troianovich.....	522
Simpson ads. Lobdell.....	783
Sloat ads. Milliken.....	481
Smith ads. Cox.....	133
Smith v. North American M. Co.....	357
Smith ads. Giffin.....	881
Smith, Ex parte.....	848
Sparrow & Trench v. Strong.....	869
Squires ads. State.....	739
Staples ads. Low.....	723
State v. Bonds.....	775
State v. Earl.....	334
State v. Kelly.....	188
State v. Logan.....	427
State v. Real del Monte G. & S. M. Co.....	437
State v. Sales.....	778
State v. Salge.....	385, 831
State v. Squires.....	739
State v. Tilford.....	201
State v. Waterman.....	453
State ex rel. Daggett v. Collins.....	859
State ex rel. Haydon v. Curry.....	208
State ex rel. Nightingill v. Commissioners of Storey County.....	221
Stead & Hunt ads. Sholes.....	627
Steel v. Steel.....	27
Stevenson ads. Arnold.....	746
Stone ads. Desmond.....	320
Storey County ads. Hale & Norcross G. and S. M. Co.....	83
Strong ads. Sparrow & Trench.....	869
Supervisors Ormsby County ads. Haydon.....	877
 Taylor ads. People.....	 83
Thompson ads. Davis.....	17
Thornburgh v. Hermann.....	400
Tilford ads. State.....	201

TABLE OF CASES.

xv

	PAGE
Tjader & Winters ads. Van Doren.....	323
Travis v. Epstein.....	94
Trustees of School District No. 1 v. Commissioners of Ormsby County.	283
Troianovich ads. Sigismund.....	522
Uncle Sam G. & S. M. Co. ads. Mallett.....	156
Uncle Sam G. & S. M. Co. ads. Oreamuno.....	179
Upton ads. Easterbrook.....	337
Van Doren v. Tjader & Winters.....	322
Van Valkenburg v. Huff.....	115
Van Vliet v. Olin.....	417
Yesey v. Hermann.....	34
Virginia City v. Chollar-Potosi G. & S. M. Co.....	609
Virginia and Gold Hill Water Co. v. Burning Moscow Co.....	620
Waitz v. Ormsby County.....	315
Walter v. Johnson.....	862
Waterman ads. State.....	453
Wick v. O'Neale.....	813
Wilde v. Wilde.....	816
Williams v. Glasgow.....	447
Wright ads. Cavanaugh.....	684
Zabriskie v. Meade.....	793

DECISIONS
OF
THE SUPREME COURT
OF THE
STATE OF NEVADA.

JANUARY TERM, 1865.

E. S. DAVIS, APPELLANT, *v.* JAMES L. THOMPSON,
RESPONDENT.

[1 NEVADA, 17.]

FEES—COLLECTION OF, IN ADVANCE.—If a county recorder makes a request for advance payment of his fees for receiving, filing and recording instruments, and the request is voluntarily complied with, it does not make an illegal transaction, but it is the legitimate collection of money for services to be rendered.

COUNTY RECORDER—WHEN BOUND TO RECORD INSTRUMENTS.—The recorder having received fees in advance for recording, indexing, etc., of instruments, was bound to record them himself or procure their recordation by his successor.

IDEM—RIGHTS OF SUCCESSOR IN OFFICE.—If a newly elected recorder is not strictly bound to record instruments, for the recordation of which his predecessor was paid, it is proper that he should do so in order to conduct the business of his office in an orderly and proper manner.

ASSUMPTORY—WHEN IMPLIED.—A necessity being thus imposed on the incoming recorder to record the deeds left unrecorded by his predecessor, and that recordation inuring to the benefit of the prior possessor of the office, the law raises an implied request on the part of the outgoing recorder to perform the labor, and an implied promise on his part to pay for the same.

Nev. Dec.—2

Opinion of the Court—Beatty, J.

APPEAL from the Third Judicial District of the Territory of Nevada, County of Lander, Hon. P. B. LOCKE, presiding.

[*18] *The facts of the case are stated in the opinion.

H. G. Worthington and Perley & De Long, for Appellant.

Williams & Bixler, for Respondent.

By the Court, BEATTY, J.:

The facts of this case are as follows: Anterior and up to the 14th day of September, 1863, James L. Thompson, the defendant, was recorder of Lander county. Whilst so recorder, he received for record and filed four hundred and ninety-six deeds, collected from the parties filing the same the sum of two dollars and fifty cents on each deed, that being the full amount chargeable by law for receiving, filing, recording, etc., of said deeds; and also received for recordation and filed twenty-five miscellaneous papers, entitled to recordation, and received four dollars per paper from those filing the same, that being the amount of legal fee payable for the receiving, filing, recording, etc., of each of those papers.

Thompson went out of office on the 14th of September, 1863, having done nothing more with these papers than merely to file them. On that day his successor in office, the plaintiff, took possession of the office and proceeded to record the deeds and papers which he found in his office thus filed but not recorded.

When the recording was done he demanded payment of his predecessor therefor, who refused to pay, and this suit was brought. The defendant answered, denying the allegations of the complaint. The cause was submitted to the judge without the intervention of a jury. The facts as herein stated were proved by the plaintiff, when he rested.

The defendant moved for a nonsuit, which was granted. The plaintiff appeals from the judgment of nonsuit. The respondent claims that there is no privity of contract between plaintiff and defendant, and therefore that no action

Opinion of the Court—Beatty, J.

could be maintained by plaintiff. To determine the validity of this defense, it is necessary to ascertain what were the rights and duties of the respective parties by reason of their official positions.

*First. As to the defendant. Being recorder, had [*19] he a right to demand in advance, of those who deposited deeds with him for record, the entire fee to which he would be entitled for filing, indexing, recording and certifying recordation of those instruments?

Upon this point our statutes are silent. It need not, perhaps, be determined in this case whether he had such an absolute right. But this proposition cannot be denied: If he requested the payment in advance for services to be performed, and the parties requiring the same chose to pay in advance (without any improper or coercive conduct on his part), it was not an illegal transaction, but a legitimate collection of money for services to be performed. Having then received his fees in a proper and legal manner, it became his duty either to record, index and certify the recordation of these instruments, or else, if he went out of office before he could do so, then to procure the same to be done by his successor. For failing to do so, he would undoubtedly be liable to an action on the part of each person by whom a deed was filed. And this, it is contended by respondent, would be the only action to which he would be liable.

When the plaintiff came into office what were his duties and liabilities?

The appellant lays down this proposition: "His duty as such recorder was fixed by law, which was to record all instruments left in his office for recordation, entitled by law to be recorded in the order of their filing."

If this proposition was correct, we should have no difficulty in deciding this case. But we can find nothing in the statute law requiring such a practice. In the absence of authority on the point we are not prepared to say that such would be the absolute requirements of the common law. That such a course would be convenient and proper, there can be no doubt. But possibly he might not have

Opinion of Beatty, J., on petition for rehearing.

been bound to record those deeds without being paid for so doing, or at least requested so to do by those having an interest in their recordation. The doubt on this point throws some embarrassment around this case.

Whilst we will not say that Davis was bound to re-
[*20] cord the *deeds, for recording which his predecessor had been paid (meaning here to express no opinion on that point), it must be admitted that for the proper and orderly arrangement of business in his office, the recordation of those deeds in the order in which they were filed was necessary.

The recordation of those deeds being then a necessity imposed on the new recorder by the outgoing officer, and Thompson reaping the benefit of that act, the law implies a request on his part and a promise to pay for that, the benefit of which he has received. In this case defendant received the entire fees for filing, indexing, recording and entering on such instrument the certificate of recordation. Having received *all* the fees and performed only a *part* of the services, he must pay to his successor in office that part of the fee in each case which is payable for the services performed by plaintiff.

The judgment of the court below will be reversed and a new trial ordered.

RESPONSE TO PETITION FOR REHEARING.

IMPLIED ASSUMPSIT.—When A. is morally and legally bound to perform certain labor, but failing to perform it himself places B. under the necessity of performing it to avoid loss or inconvenience, and A. receives the benefit of that performance, the law will imply both a *request* to B. to perform the labor, and a *promise* to pay for it when performed.

[*21] *By the Court, BEATTY, J.:

Counsel for respondent asked for a rehearing in this case, and say the opinion of the court, or the result of that opinion, “might be syllogistically stated thus: When one performs a service enjoined by law upon another, for which the latter has received compensation, the law implies a promise to pay for the service so much as it is reasonably *worth.*”

Opinion of Beatty, J., on petition for rehearing.

We think this hardly states the proposition correctly. At least this statement omits part of the proposition. To entitle the party performing the service to compensation, he must have done it not as a mere volunteer, but because he was placed under some necessity or obligation to do so by the conduct of the party who received the compensation.

With this qualification, we still think the proposition a correct one. In regard to the count for money had and received, we do not controvert the views of counsel, and did not base our opinion in the case on the ground that that count could be sustained.

Counsel ask, Can it be claimed that the contract of Thompson was of such a character as to render him liable to two persons at the same time, one of whom was not a party to the contract? According to the views of the court there were two separate and distinct contracts in regard to each deed.

By the first contract, Thompson agreed with the depositor of the deed to record it in due time, with the proper index, certificate, etc. If he failed to do this, he was liable to the party who deposited the deed, whether that failure was a failure to do it in due season and in a lawful manner, or a total failure

By a subsequent contract he agreed with Davis to pay him for the recording of these deeds and must pay for the performance of that contract. But counsel argue there was no request on the part of Thompson to perform this labor, and therefore no contract, express or implied. Counsel say, "The court has the law imply both the *request* and the *promise to pay*." That is exactly what the court means to express. That under such circumstances, the law will imply both a *request* to perform the labor and a promise to pay for it. It was the duty of *Thompson, under [*22] the circumstances, to request Davis to record the deeds. The law implies he did request him, and did promise to pay for the service.

This is not a novel doctrine. A husband, in affluent circumstances, turns his wife out of doors and advertises to the world that he will pay no bills of her contracting. A

Points decided.

tradesman, with this notice before his eyes, furnishes her with goods suitable to the circumstances of herself and husband. He may bring his action against the husband, alleging the goods were furnished at *his* request; and upon the proof of these circumstances, the law implies the request, whilst, in fact, the husband is constantly protesting

In such case we think the action is maintained against the husband on the same principles as it is maintained in this case. The goods are not in such case furnished at request of husband in point of fact. But it was his duty to have made such request, and the law implies he did make it.

So here it was the duty of Thompson to have made the request (and made it of Davis, for no one else could have performed the service), and the law implies that he did make it.

The petition is denied.

SOLOMON GELLER ET AL., APPELLANTS, v. G. W. HUFFAKER, RESPONDENT.

[1 NEVADA, 22.]

WITNESS—WHEN INCOMPETENT ON THE GROUND OF INTEREST.—The interest which will render a person incompetent as a witness must be a direct interest in the judgment; he must either gain or lose by the direct operation or effect of the judgment, or the record of it must be such as would make it legal evidence for or against him in some other action.

EVIDENCE—VERDICT AND JUDGMENT, WHEN TO BE GIVEN IN EVIDENCE.—To entitle a verdict and judgment thereon to be given in evidence, it must be between the same parties or privies, and upon the same point; except where the verdict or judgment is upon subjects of a public nature, such as customs and the like.

ITEM.—The only facts which a verdict establishes are those which are necessary to support it, and upon which issue has been joined.

ITEM.—If a complaint contain several counts or several distinct grounds upon either of which a recovery could be had, and the general issue be pleaded, a general verdict and judgment thereon in such a case cannot be given in evidence to establish all the grounds upon which plaintiff claimed the right to recover.

APPEAL from the First Judicial District of the Territory of Nevada, Washoe County, Hon. J. W. NORTH presiding.

Opinion of the Court—Lewis, C. J.

The facts of this case are stated in the opinion.

Bryan & Seely, for Appellants.

Perley & De Long, for Respondent.

*By the Court, LEWIS, C. J.:

[*24]

This action is brought to recover the sum of five thousand dollars damages alleged by plaintiffs to have been sustained by them by reason of the diversion of the water of Thomas's creek from their land by the defendant. The plaintiffs allege that they are the owners of certain arable land in the county of Washoe; that the water of Thomas's creek naturally did flow, and of right ought to flow, through their land, and also that they were entitled to have the water of said creek flow through their land, by reason of their prior appropriation of the same. Upon the trial of the case below, the plaintiffs introduced one Langley as a witness on their behalf, for the purpose of proving the allegation of the complaint generally. Langley is the owner of a tract of arable land lying above plaintiffs' ranch, on the same stream. It is admitted that if the water of the creek was permitted to flow to the land of plaintiff, through what they claimed to be the natural channel, it would pass through the land of the witness; and the witness stated, upon his *voir dire*, that he was interested in having the water of the creek flow through this natural channel to the plaintiffs' ranch, and that it would also take it through his land.

Upon the trial the question arose as to the location of the natural channel of the stream; the plaintiffs claiming that it was the channel which carried the water through their land, and the defendant claiming that there had been no diversion, but that the natural channel was through his land, and that the stream had naturally taken that course without any artificial means employed to divert it from plaintiffs' land.

The defendant's counsel objected to the testimony of Langley, upon the ground of interest, the witness (counsel claiming) having an interest in the event of the action.

Opinion of the Court—Lewis, C. J.

The statute of Nevada, which is but an enunciation of the common law rule, clearly specifies what shall constitute such an interest as will render a witness incompetent on the ground of interest. Section 341, p. 373, provides that "the true test of the interest of a person which shall render him incompetent as a witness, shall be that he will gain or lose by the direct legal operation and effect of the judgment; [*25] or that the *record of the judgment will be legal evidence for or against him in some other action."

Can it be said that the witness, Langley, would gain or lose by the *direct legal* operation and effect of the judgment in this case, which could only be for the recovery of a specific sum of money? Certainly not; neither would he lose if the defendant prevailed. The judgment, if in favor of the plaintiffs, would not return the waters of Thomas's creek to the land of plaintiffs, or to that of witness. And if the plaintiffs were intending to use the judgment in their action as a basis for an injunction in another action, the interest would even then be uncertain and contingent, depending upon the pleasure of plaintiffs to bring such second suit.

The interest which will render a witness incompetent must be, says Greenleaf, "a present, certain and vested interest, and not an interest uncertain, remote or contingent." (1 Greenl. Ev., Sec. 390.) Surely, the mere fact that the witness owned land on the same stream with the plaintiffs would not give him a present, certain or vested interest in the result of an action brought by plaintiffs to recover damages for the diversion of the stream. If this were an action to obtain an injunction against the defendant to restrain him from diverting the waters of the creek from the plaintiffs' land, a different question would present itself.

But would the record of the judgment in this action be legal evidence for or against the witness in some other action?

We think not. The general rule is, that to entitle a verdict and judgment thereon to be given in evidence, it must be upon the same point and between *the same parties*. (2

Opinion of the Court—Lewis, C. J.

Cow. & Hill's Notes to Phil. Ev.; 42 Id. 168; 1 Greenl. Ev., Secs. 522, 523.) But there are some exceptions to this general rule, as where the verdict or judgment is upon subjects of a public nature, such as customs and the like. And Greenleaf (vol. 1, sec. 405), says: "The usual and clearest illustration of this breach of the rule is the case of an action brought by or against one of several persons who claim a customary right of common, or some other species of customary right. In general, in all cases depending on the existence *of a particular custom, a judgment es- [*26] tablishing the custom is evidence, though the parties are different."

Upon this authority the defendant's counsel insists that the witness is incompetent, because he says the verdict would establish the natural channel of the stream, and, therefore, could be used by the witness in some other action.

But the verdict in this case would not establish any such fact. The only facts which the verdict could establish would be such as were *necessary* to support the verdict, and upon which issue had been joined. If a complaint contain several counts or several distinct grounds upon either of which a recovery could be had, and the general issue is pleaded, a general verdict and judgment thereon in such a case certainly could not be given in evidence to establish all the grounds upon which plaintiff claimed the right to recover. (2 Cow. & Hill's Notes to Phil. Ev., pp. 36, 37.)

Hence, say Cowen and Hill, p. 37, "A verdict and judgment for the defendant on the general issue pleaded, in which the plaintiff claimed damages consequent upon the defendant's act in wrongfully raising his mill-dam, will not estop the plaintiff from alleging the same act as the occasion of damages subsequently sustained. For the finding in the former action may have been on the grounds that the plaintiff was not injured by the raising of the dam, or had released his cause of action, or had given the defendant permission to do the act complained of, etc., and did not necessarily determine the defendant's right to raise his dam and continue it in that state." Citing *Shafer v. Stonebraker* (4

Opinion of the Court—Lewis, C. J.

Gill. and John. 345, 355, 356.) The reason given why the verdict should not conclude the parties in the second action, was because the first *may not* have been upon the same point at issue.

So in the case at bar, the verdict of the jury which, if for the plaintiffs, would be for a certain sum of money, might have been found upon the fact that the plaintiffs were the prior appropriators of the water of Thomas's creek, and not upon the ground that the natural channel of the stream passed through their land.

The plaintiffs claiming the right to recover upon two distinct grounds, priority of appropriation, and that the [*27] water was *diverted out of its natural channel, and issue being taken upon both points, therefore a general verdict would only establish the fact that the plaintiffs were entitled to have the waters of Thomas's creek flow through their land, but whether upon the ground that they were the prior appropriators, or that the natural channel passed through their land, a general verdict would not determine. We conclude, therefore, that Langley had no interest in the event of the suit, and that the verdict and judgment in this case could not be used by or against him in another suit.

It is also claimed that to show error in the court below in rejecting the witness, the record should show the specific purpose for which he was offered. This is clearly untenable. The witness was introduced to prove the entire case, and plaintiffs claim that he is competent.

The case of *Sparks v. Kohler* (3 Cal. 299), is not an analogous case. In that case the witness Kohler was only competent upon a single point, but was offered generally, the witness being incompetent generally, and the specific point upon which he was called not being stated, the court was correct in excluding him; but in this case the witness Langley is competent generally. The court below, therefore, erred in excluding him.

Let the case be remanded for further proceedings.

Opinion of the Court—Brosnan, J.

T. W. STEEL, RESPONDENT, v. JOHN STEEL, APPELLANT.

[1 NEVADA, 27.]

ARBITRATION—STATUTES MUST BE STRICTLY CONSTRUED.—Our statutory proceedings in cases of arbitration are in derogation of the common law, and must be strictly pursued.

STATUTES—WHEN MANDATORY.—Whenever a statute prescribes certain specific acts to be done as prerequisite to the acquiring of jurisdiction, or the enforcement of a legal remedy, such acts must be substantially performed in the manner prescribed, in order to give validity to the proceeding.

ARBITRATION—SUBMISSION OF, MUST BE FILED BEFORE A HEARING.—The filing of the submission, and the entry of the same in the clerk's register, in cases of arbitration, answer the purposes of the complaint and answer in ordinary actions, and like them must be filed before a hearing, trial, or judgment.

AWARD—VALIDITY OF, HOW DETERMINED.—At common law, scarcely any matter short of a want of power or jurisdiction appearing upon the face of an award, is subject to a question or inquiry, and every reasonable intendment should be made to uphold it. But in statutory awards no such liberal interpretation can be invoked to its aid. Its validity must be determined by the provisions of the statute providing it.

***APPEAL** from the First Judicial District of the [*28]
Territory of Nevada, Storey County, Hon. J. W.
NORTH presiding.

The facts appear in the opinion of the court.

Robinson & Foster, for Appellant.

Clark Churchill, for Respondent.

*By the Court, BROSNAN, J.: [*29]

This is an appeal from a judgment of the district court of the first judicial district, entered upon an award in favor of the respondent.

The transcript discloses the following facts:

*On the 15th day of June, 1864, a copy, as stated, [*30]
of the submission was filed in the office of the said
district court.

This document was executed by Thomas W. Steel, but
not by John Steel; and among other matters provides that

Opinion of the Court—BRUNNEN, J.

the submission be made and entered as an order of the said district court.

On the 8th day of July, 1864, the arbitrators filed their award with the clerk. On the 11th day of July, three days after filing the award, the respondent filed in the office of said clerk a submission of the same date and tenor as the document filed on the 15th day of June, and then instructed the clerk to make all the entries required by the statute, "in order" (as the record states) "that said submission may become an order of court."

As appears from the record before the court, which, as certified by the clerk, contains a full, true and correct transcript of all the proceedings had in the case, the only entry in the clerk's register is the following:

"Submission made on the 14th day of June, 1864. Said arbitrators to make the award on or before ten days from the time when the testimony on behalf of both parties is closed, and the matters in difference fully submitted to them."

This entry was made on the 16th day of July, 1864, eight days after the award was filed. On the 22d day of July, judgment was entered by order of the court below.

The respondent's counsel moved to dismiss the case, on the ground that no motion was made before the entry of judgment to vacate or correct the award, as provided by law. (Stat. 1861, pp. 372, 483, Sec. 335, 336, 337.)

If this judgment had been rendered in conformity to the requirements of the statute, and is valid, the counsel is correct, and the appeal is clearly unauthorized.

This is not denied by appellant's counsel; but he contends that the judgment is bad for several reasons, and particularly because the entries required by law were not made.

The determination of this point brings us directly to a review of the requirements of the statute, and of the acts necessary to be performed under it.

It may be proper to state here that the course of [*31] proceedings *prescribed by the statute, is in derogation of the common law, and must be strictly followed. Whenever a statute prescribes certain specific acts

Opinion of the Court—Brosnan, J.

to be done as prerequisites to the acquiring of jurisdiction or the enforcement of a legal remedy, such acts must be substantially performed in the manner prescribed, in order to give validity to the proceeding. In the case at bar, the statute required the submission to be filed with the clerk, etc. "The clerk shall thereupon" (that is, upon the filing) "enter on his register of actions, a note of the submission, with the names of the parties, the names of the arbitrators, the date of submission, when filed, and the time limited by the submission, if any, within which the award shall be made." Upon the filing of the award also, a note thereof shall be made in the register. So far as we are judicially informed by this transcript nearly all of these acts were omitted. This is a special, not the ordinary mode for recovery of a judgment; the requirements of the statute authorizing it are not idle, useless formulæ; they are mandates of law not to be disregarded, and must be substantially complied with. It was not seriously claimed, on the argument, by the learned counsel of the respondent, that the paper filed on the 15th of June was a good submission, owing to the want of execution by one of the parties. And it appears from the statement in the case, that no reliance was placed upon it, because when the submission, executed by both parties, was filed, on the 11th day of July, after the award had been filed, the clerk was instructed to make all the requisite entries, "in order (as stated) that said submission may become an order of court;" thus virtually conceding the invalidity of the submission filed June 15, 1864. How else could it be? Had the case rested upon that first defective submission, and the record showed a judgment against the appellant, having only for a predicate a submission not executed by him, certainly no person could reasonably contend that such a judgment would be valid. But the respondent's counsel insists that the submission may be filed at any time after filing the award, though no entry or note be previously made by the clerk in his register of actions; and, therefore, that the filing the submission on the 11th day of July cured all antecedent errors and defects.

**This, we think, is incorrect. But even were it* [*32]

Opinion of the Court—Brosnan, J.

conceded, it would not avail the respondent's case, for the reason that the necessary note of submission had not been then entered; and for the further reason that when entered, namely, on the 16th day of July, eight days after filing the award, and five days after filing the last submission, it does not comply with the demands of the statute. In short, the filing of the submission and the entry of the prescribed note in this class of cases are the equivalents, and subserve the use of the complaint and answer in an ordinary action, and like both must be filed before a hearing, trial, or judgment.

Our attention has been directed to several adjudicated cases to show that awards are usually liberally construed. Of this rule there is no question; it is well established as regards awards at common law.

The current decisions seem to be that awards of that kind cannot be impeached at law, if made in good faith, whether the arbitrators decide wrong either as to the law or the facts of the case.

Scarcely any matter, short of a want of power or jurisdiction appearing upon the face of such award, is subject to question or inquiry. And were this an award at common law, every reasonable intendment should be made to uphold it.

But the award before the court is statutory, and such a liberal interpretation cannot be invoked in its aid. Its validity must be determined under the provisions of the statute authorizing it. And although it may be a good award under the rules of the common law, of which we express no opinion, yet it must stand or fall as it is, or is not, supported by the statute.

Some other points have been raised and discussed; but as we have determined that the judgment should be reversed on the ground of a departure in the proceedings from the provisions of the statute, we have not deemed it necessary to examine them.

The judgment is reversed.

Opinion of the Court—Beatty, J.

THE PEOPLE, RESPONDENT, v. JESSE BONDS,
APPELLANT.

[1 NEVADA, 33.]

- ¹INSTRUCTIONS—CRIMINAL LAW—WHEN REASONS FOR REFUSING INSTRUCTIONS SHOULD BE GIVEN.—When a defendant in an indictment for murder asks for an instruction which is clearly law, the court should give it, although the same legal proposition may be substantially set out in another instruction given by the court. At least, if such instruction is refused in presence of the jury, the court must state it is only refused because already given, substantially, in another instruction.
- ²IDEM—COURT CANNOT INSTRUCT THE JURY AS TO THE FACTS.—Where an instruction asked by defendant assumes the existence of a fact not admitted by the prosecution the court should refuse to give it in that form.
- IDEM—EVIDENCE—WEIGHT OF, DETERMINED BY THE JURY.—It is error in the court to state, in the presence of the jury, that the argument of counsel in regard to facts in the case is not tenable; that there is no evidence to support the hypothesis of counsel. The weight of evidence and its effect in proving secondary facts is to be determined by the jury.
- ³ORAL INSTRUCTIONS CANNOT BE GIVEN EXCEPT BY CONSENT.—The court cannot give any instruction verbally unless the prisoner assents, and that assent must affirmatively appear.
- ⁴REMARKS OF COURT, WHEN EQUIVALENT TO AN INSTRUCTION.—A remark made by the presiding judge, in the hearing of the jury, has precisely the same effect as if given as a formal instruction.

APPEAL from the Third Judicial District of the Territory of Nevada, Lander County, Hon. P. B. LOCKE presiding.

The facts of the case are stated in the opinion.

Williams & Bixler, for Appellant.

Thomas E. Hayden, for Respondent.

*By the Court, BEATTY, J.:

[*34]

This was an indictment for murder. The defendant was tried and found guilty of murder in the second degree, and judgment rendered in accordance with the verdict.

After the testimony closed, the judge, on his motion, gave nine instructions, each and all of which were excepted

(1) See 3 Nev. 78; 9 Nev. 107. *Held*, not to apply to civil cases, 7 Nev. 174.

(2) 3 Nev. 498; 4 Nev. 266; 6 Nev. 138; 7 Nev. 149.

(3) 9 Nev. 132.

(4) 7 Nev. 377.

Opinion of the Court—Beatty, J.

to by the defendant. On the argument in this court error in those instructions is pointed out or insisted. They all appear to be strictly in accordance with law, as down in common-law books and our statutes.

The defendant asked the court for eight instructions on his behalf.

The court gave the first instruction asked, and refused the other seven. It is insisted in this court that the sixth and eighth instructions should have been given, and that refusal to give them was error.

The sixth instruction is in these words:

“That if the jury entertain any reasonable doubt of the guilt of defendant, they will give to defendant the benefit and advantage of said doubt.”

This was a legal principle expressed in unmistakable language; one which is applicable to every case of an instrument for felony. Counsel for respondent admits that the instruction contains the law applicable to the [*35] but contends that *it was not error, for the reason that the judge had, of his own motion, already given the same instruction.

To this there are two answers:

First. The language used by the judge in the instruction given, is not the same. The defendant had a right to the instruction, in the language chosen by himself and not by the court, if that language was free from ambiguity, and expressed only a legal proposition applicable to the case on trial.

Second. The simple refusal of the judge to give the instruction, without any explanation, if done in the presence of the jury (as seems to have been the case here) has a tendency to raise a presumption in their minds that it did not contain the law.

This would be highly prejudicial to the defendant.

We are of the opinion this was error prejudicial to the defendant.

It is also insisted the eighth instruction should have been given.

That instruction is given in these words:

“That the killing of deceased by defendant”

of proof by circumstantial evidence, if the jury can explain the same by any reasonable hypothesis, inconsistent with defendant's guilt, the jury are bound to adopt that hypothesis, and find in favor of defendant."

This instruction set out by assuming that the act of killing was only proved by circumstantial evidence. The court in giving instructions was not authorized to assume any such facts in the face of the direct testimony of plaintiff in regard to the shooting. The instruction was, therefore, properly refused.

Another error complained of by defendant is that the court, on refusing to give instructions Nos. 2, 3, 4, 5, 6, 7 and 8, used this language in relation to the same:

"This idea of an accident, which has been urged by the defense, amounts to nothing, and is not tenable. There is no evidence to show it was an accident; on the contrary, it shows there was a scuffle, and that the defendant persisted in holding on to the pistol."

This was erroneous.

*First. The language itself was improper; it took [*36] from the jury the determination of a fact peculiarly in their province, that is, to determine whether the discharge of the pistol was accidental or intentional.

Second. If the instruction had been a proper one, the court had no right to give it verbally without the consent of the defendant, which must affirmatively appear. (Sec. 355, Crim. Pr. Act; 8 Cal. 341, 423.)

There is nothing in the point made by the respondent's counsel that this was not a formal instruction, but merely a remark made to counsel. Such a remark made by the presiding judge in the hearing of the jury would have precisely the same effect as if given as a formal instruction.

For this reason the judgment must be reversed and a new trial ordered.

Opinion of the Court—Beatty, J.

H. M. VESEY, APPELLANT, v. LUCIEN HERMANN
RESPONDENT.

[1 NEVADA, 36.]

¹ CONSTITUTION—HOW CONSTRUED.—When language is used in the Constitution capable of two interpretations, and there is nothing in the general context of the instrument to determine which interpretation best conforms to the intention of the convention, then resort must be had to a strict grammatical construction of the language to determine its effect.

SECTION 32, ARTICLE IV, OF CONSTITUTION CONSTRUED.

APPEAL from the First Judicial District of the State of Nevada, Storey County, Hon. R. S. MESICK presiding.

The facts of the case are stated in the opinion.

Taylor & Campbell, for Appellant.

Crittenden & Sunderland, for Respondent.

[*37] *By the Court, BEATTY, J.:

The plaintiff and appellant in this case was elected county recorder at the September election in 1864, and soon thereafter entered upon the performance of his duties as recorder of Storey county. The defendant and respondent was, at the same election, elected county clerk of Storey county, and thereafter qualified and entered upon the performance of his duties as such clerk.

Under the laws of the Territory, as then existing, the county clerk was *ex officio* county auditor. The plaintiff, appellant, claims that by the adoption of the Constitution, he, as county recorder, became *ex officio* county auditor. This proceeding was instituted to determine which of the parties is entitled, under the State Constitution, to exercise the functions of auditor and receive the perquisites of that office.

Under the second section of the schedule, "all laws of the Territory not repugnant to the Constitution are continued in force until they expire by their own limitations, or be altered or repealed by the legislature." The thirteenth section of

Opinion of the Court—Beatty, J.

the schedule provides that "all county officers under the laws of the Territory of Nevada, at the time when the Constitution shall take effect, whose offices are not inconsistent with the provisions of this Constitution, shall continue in office until the first Monday in January, 1867," etc.

Sec. 32 of *Article IV of the Constitution reads as [*38] follows: "The legislature shall provide for the election by the people of a clerk of the supreme court, county clerks, county recorders, who shall be *ex officio* county auditors, district attorneys, sheriffs, county surveyors, public administrators and other necessary officers, and fix by law their duties and compensation. County clerks shall be *ex officio* clerks of the courts of record and of the boards of county commissioners in and for the respective counties."

The only question to be determined in this case is whether that clause of the thirty-second section of article four, which is in these words, "who shall be *ex officio* county auditors," was intended by the framers of the Constitution to apply to those persons who might be county recorders at the time the State government went into operation, or only to those whose election was to be provided for by law to be passed by the State legislature.

The appellant contends that it was the intention of the framers of the Constitution to take the auditorship from the clerk because he would, in the ordinary course of events, have many accounts of his own to be audited against the county, and give it to the recorder, who, from the nature of his office, would have few or no accounts against the county. That being governed by such motives, we are to presume it was their intention that this change in the auditorship should take effect simultaneously with the adoption of the Constitution.

For respondent, it is contended, that it was the policy of the convention to retain all county officers in their present situations until January, 1867, and that the county auditorship is a distinct office, and that appellant was county auditor when the Constitution went into effect and the State government was adopted, and that he must remain such until January, 1867, under the provisions of section thirteen of the schedule.

Opinion of the Court—Beatty, J.

It would be hard to tell what the convention did intend in regard to this particular point. Probably the question never presented itself to the mind of any member as to *when* the duties of the auditorship should be transferred from the office of the county clerk to that of the county recorder. Had such a question been presented to the mind of any member he would most probably have moved an [*39] amendment of the language *of section thirteen of schedule so as to render that certain which, as it now reads, is somewhat ambiguous.

Believing there is nothing in the general policy or context of the Constitution to determine the proper construction of section thirty-two of article four, we have looked to that section to see if a proper analysis thereof would determine this question. This section declares that “the legislature shall provide for the election, etc., of county recorders, who shall be *ex officio* county auditors.” It appears to us that the pronoun “who” in this sentence has relation only to those recorders whose election is to take place under a law to be passed by the State legislature, and not any recorder who is in office when the Constitution was to take effect. To make it relate to present incumbents would, in our opinion, be a forced and unnatural construction of the sentence; and this view is strengthened by a provision in regard to county clerks.

It was necessary that the present incumbents of county clerkships should, from the moment the State government went into effect, exercise the new functions of clerks of the district courts. In framing the thirty-second section of article four, the draftsman instead of saying: “The legislature shall provide for the election, etc., of county clerks, *who shall be ex officio clerks of the courts of record,*” etc., which would have been phraseology similar to that used in regard to the recorders, omits the language which I have expressed in italics, and, after providing in that sentence for the election of other county officers, adds a separate sentence in these words: “County clerks shall be *ex officio* clerks of the courts of record,” etc.

Here seems a distinction to be made between county

Points decided.

clerks and county recorders. The sentence in regard to clerks refers as well to those in office as to those to be elected. It is general in its terms. The sentence in regard to recorders, on the contrary, seems to be confined to those *who are to be elected under a law* to be passed by the State legislature. For these reasons, we are of opinion the judgment of the court below must be affirmed.

A. C. HAMILTON ET AL., RESPONDENTS, v. JOHN
KNEELAND ET AL., APPELLANTS.

[1 NEVADA, 40.]

ESTATE UPON CONDITION—WHAT CONSTITUTES.—Where a written agreement is entered into by which, upon certain terms and conditions, the parties of the second part are permitted to erect a steam quartz mill on the premises of the party of the first part; and it is made the duty of the party of the second part to erect the mill within a certain time, and among other things to pump the water from the mine of the parties of the first part, it gives the parties of the second part an estate upon condition in the premises.

IDEM.—No precise words are required to create a condition. The intention of the parties, which is to be gathered from the whole instrument and the subject-matter to which it relates, must determine the question.

IDEM—COMMON LAW RULE NOT RECOGNIZED.—The common law rule, that a condition cannot be reserved to any but the grantor and his heirs, has not been recognized as the law in this country.

APPEAL DOES NOT LIE FROM AN ORDER MADE BY A REFEREE.—Under the organic act and laws of the Territory of Nevada no appeal could be taken from an order made by a referee.

COMMON LAW.—The common law of England, as adopted in this country, is usually to be taken as modified by English statutes passed prior to the declaration of American Independence.

STATUTE 32 HENRY VIII, CONSTRUED.—The statute of 32 Henry VIII, providing for entering, upon condition broken, is applicable not only to breach of condition in law, but also in deed.

ESTATE UPON CONDITION—ACTUAL ENTRY—DEMAND OF POSSESSION.—Upon a breach of a condition upon which an estate is held, an actual entry is not necessary to defeat the estate; a demand of possession is sufficient.

APPEAL from the District Court of the First Judicial District of Nevada Territory, Storey County, Hon. J. W. NORTH presiding.

Opinion of the Court—Lewis, C. J.

The facts of this case sufficiently appear in the opinion of the court.

Crittenden & Sunderland and Tol Robinson, for Appellants.

Kirkpatrick & Rhodes and G. A. Nourse, for Respondents.

[*49] *By the Court, LEWIS, C. J.:

This is an action of ejectment brought to recover possession of a mining claim located in Gold Hill, in the county of Storey. The complaint is in the usual form, alleging title in the plaintiffs, and ouster and wrongful holding by defendants. The defendants, Kneeland and Requa, answer jointly, admitting the title of Burke and Hamilton, but denying that they are entitled to the possession of the premises, or that they have any interest in the mill, machinery, pumps, fixtures, or other improvements connected with the same; also denying the ouster and wrongful withholding of the premises by them; and claiming the right of possession in themselves under and by virtue of a certain agreement which is made a part of their answer.

They allege that they have performed all the requirements of the agreement on their part, and aver their willingness to crush the five thousand tons of rock mentioned therein, when the same shall be furnished to them by the plaintiffs.

The case was referred to a referee to report facts and a judgment, and the following facts and conclusions of law were reported:

First. The ground in controversy is the property of the plaintiffs.

Second. On the 9th day of November, 1861, and at the time of making the contract hereinafter stated, said ground was the property of the plaintiffs A. C. Hamilton and E. R. Burke.

Third. Plaintiffs John Drynen, Charles W. Newman and Samuel Doake, purchased interests in said grounds subsequently to the 9th day of November, 1861.

Fourth. On the 9th day of November, 1861, plaintiffs *Hamilton and Burke* and Robert A. McLellan, made and

Opinion of the Court—Lewis, C. J.

entered into an agreement in writing, a copy of which is made a part of the answer of defendants.

Fifth. On the 25th day of November, 1861, said Robert A. McLellan transferred and assigned to defendant Isaac L. Bequa, one-fourth interest in said agreement, and conveyed a like interest in the quartz-mill and machinery in said premises; and on the 6th day of October, 1862, said McLellan conveyed an *undivided three-fourths of [*50] said mill and machinery to defendant John Kneeland.

Sixth. On the 5th day of February, 1864, said John Kneeland leased three-fourths, undivided, of said mill and machinery to Robert Carson; and on the 1st day of March, 1864, said Carson transferred and assigned said lease to intervener, E. B. Kenyon.

Seventh. Said E. B. Kenyon holds a mortgage and debt against defendant (Kneeland), as set out in the intervention herein.

Eighth. Said Carson and Kenyon went into possession of Kneeland's interest after the bringing of this suit, and with full knowledge of its pendency.

Ninth. The mill referred to in said contract between Hamilton and Burke and McLellan, was commenced in December, 1861, and completed in the latter part of October, 1862.

Tenth. The shaft mentioned in said agreement, was sunk to the depth of two hundred and fifty-seven and seven-twelfths feet from the surface of the ground after the ground was graded, and a drift run easterly from said shaft about one hundred and twenty-five feet, crossing a ledge of pay rock about ten feet wide, and running about twenty-five feet beyond the ledge. The bottom of said drift was two hundred and forty-six feet below said surface. This work was done about a month before the mill was completed.

Eleventh. The pumping mentioned in said agreement started when the shaft was at the depth of one hundred and fifty feet, and ceased directly after the completion of the drift. At that time it was agreed by Burke and McLellan that the pumping might cease until the mill should be finished. There was no understanding that the pumping

Opinion of the Court—Lewis, C. J.

should stop altogether. It was impossible to work the ledge without pumping to keep the mine free from water, and for this purpose steam machinery was necessary. Kneeland went into possession of the mill with Requa about the 1st of December, 1862. There was then about twenty-five feet of water in the shaft, and enough in the drift to prevent work. In that month, and in the following January, February and March, plaintiffs demanded that defendants should pump out the shaft, so that the ledge might be [*51] *worked, but defendants positively refused. They were afterwards frequently requested to go and pump, but never did so.

Twelfth. Plaintiffs offered to furnish ore if defendants would pump out the mine. If the mine had been pumped out, there could have been more than sufficient ore taken from it to supply the mill constantly to the extent of five thousand tons.

Thirteenth. Notice *lis pendens* was duly filed in the office of the county recorder of Storey county, on the 24th day of December, 1863.

Fourteenth. Plaintiffs demanded possession of the ground in controversy on the 28th day of December, 1863.

I find, as conclusions of law, from the foregoing facts, that by reason of the non-performance of the contract between Burke and Hamilton and McLellan, on the part of McLellan and these defendants, his assignees, said defendants had, before the commencement of this action, lost the right of possession of the disputed premises, and that the plaintiffs are entitled to the relief prayed for in their complaint.

A motion for new trial having been made and denied, the defendants appeal, assigning numerous errors, only four of which are relied upon in this court, which are:

First. That the referee erred in holding that a refusal on the part of the defendants to pump out the mine at the time, and under the circumstances, was a violation of the written agreement between Burke and Hamilton and McLellan.

Second. In holding that such violation of the contract *worked a forfeiture*.

Third. In holding that the terms of the contract were conditions and not covenants.

Fourth. In holding that the assignees could claim a forfeiture of defendants' rights under the contract upon breach of condition.

If the agreement between Burke and Hamilton and McLellan is uncertain as to when the pumping by McLellan should commence, the intention of the parties to it, which is of controlling force when ascertained, should govern. (2 Parsons's Cont. 6; Id. 11.) The conduct of the parties, the object which they had in view in entering into the agreement, and the manner in which they carried out this provision *of it, establishes the fact beyond a [*52] peradventure that the pumping was to be done by defendants at the time the shaft was being sunk, if necessary. And, indeed, it appears that no misunderstanding upon this point arose between the parties until the shaft had been sunk to its required depth, the ledge struck, and plaintiffs were ready to take out the ore.

But should the defendants' interpretation of this agreement be adopted, that is, that it was not their duty under it to pump the water from a prospecting shaft but only from the mine, it is equally fatal to their case, because it was the mine which they refused to pump, and that, too, when the plaintiffs were fully prepared to take out the ore.

Whatever difference of opinion there may exist as to the duty of the defendants to pump the water from the shaft, none can exist as to their duty to keep the mine free from water. The instrument itself is explicit upon the point. It provides: "That the said party of the second part shall furnish the motive power at the mill, and machinery to hoist the ore from the said mine as aforesaid, and shall also furnish the pump and necessary machinery, and pump from the said mine the water, so as to keep the same constantly freed of water, so that the said mining ground and claims can be safely and conveniently worked."

This was not done; but it seems the defendants persistently refused to pump out the mine after the ledge was struck in the lower drift. And the referee finds that "it

Opinion of the Court—Lewis, C. J.

was impossible to work the ledge without pumping to keep the mine free from water." By this refusal on the part of the defendants to perform their agreement in this particular, the very object for which the agreement was entered into by plaintiffs, that is, the development of their mines, was entirely defeated.

When the pumping was stopped for the benefit of McLellan, as it appears, and the mine in consequence thereof filled with water so that it could not be worked, for him and his assignees persistently refused to pump it, because, as it is claimed by them, it is not their duty to pump the mine until rock is furnished to them, is an exhibition of bad faith, to say the least of it, which should receive no favor in a court of justice. But did the violation of [*53] the agreement by the defendants *work a forfeiture of their rights or the estate which they acquired under it? If the estate which the defendants acquired in the premises was upon condition, the breach of the condition will work a forfeiture of the estate; but if the stipulations of the agreement are to be construed as covenants and not conditions, then the plaintiffs have mistaken their remedy, and they must fail. After the erection of the mill upon the premises by McLellan, it is clear that he had an interest in the land, and I think it equally clear that that interest was an estate upon conditions.

Chancellor Kent (vol. 4, p. 125), says: "Estates upon condition are such as have a qualification annexed to them by which they may, upon the happening of a particular event, be created or enlarged, or *defeated*." After speaking of conditions in law, he says of conditions in deed: "These conditions are expressly mentioned in the contract between the parties, and the object of them is either to avoid or defeat an estate, as if a man, to use the case put by Littleton, enfeoffs another in fee, reserving to himself and his heirs a yearly rent, with an expressed condition annexed, that if the rent is unpaid the feoffor and his heirs may enter and hold the land free of the feoffment. So if a grant be to A. in fee, with a proviso, that if he did not pay twenty pounds by *such a day*, the estate should be void, and the grantor or

Opinion of the Court—Lewis, C. J.

his heirs may enter and take advantage of the breach by ejectment, though there be no clause of entry." (Id. 127.)

Conditions which will work a forfeiture of an estate, it is true, are not favored, and will not be readily implied; but the estate created in McLellan is so unmistakably upon condition, that we could not hold otherwise without disregarding the plain letter of the agreement and the evident intention of the parties. This agreement provides: "That whereas the said Hamilton and Burke are the owners of the mining ground and claims of forty feet in width, part of the so-called 'Sabins ground,' in said Gold Hill, and being bounded on the northerly side by the mining ground of W. H. Irwin, and on the southerly side by the mining ground of Stewart, Kirkpatrick, and Churchill; and whereas, said parties have agreed that said party of the second part may erect a steam quartz-mill of sixteen stamps on said *mining ground, for the working and reducing of five [*54] thousand tons of ore, to be taken from said mining claims and ground, on *certain terms and conditions*."

The only rational and grammatical construction which can be put upon this language is, that McLellan was to have the privilege of erecting a steam quartz-mill on the plaintiff's premises, upon "the terms and conditions" which are specifically mentioned in the agreement itself, one of which was that he would "pump from the said mine the water, so as to keep the same constantly freed from water, so that the said mining ground and claims can be safely and conveniently worked."

Again, no precise words are required to create a condition. (2 Parsons's Con. 39.)

"Indeed," says the same author, "courts seem to agree of late that the decision must always depend upon the intention of the parties, to be collected in each particular case from the terms of the agreement itself, and from the subject-matter to which it relates. It cannot depend upon any formal arrangement of the words, but on the reason and sense of the thing, as it is to be collected from the whole contract." But here we have the exact words to create a condition. (*Gray v. Blanchard*, 8 Pick. 283.)

Opinion of the Court—Lewis, C. J.

And the evident intention of the parties, as shadowed forth in the entire instrument, harmonizes with these words.

Unless we believe that Burke and Hamilton intended to permit the erection of the mill in question on their premises, and to permit its continuance there, regardless of whether McLellan should perform his part of the agreement or not, the conclusion is irresistible that they only intended to permit it upon the conditions mentioned in the instrument itself. That would be the only advantage which they could possibly derive from the location of the mill upon their premises, and it is not reasonable to suppose that they intended to permit the defendants to enjoy the premises except upon the performance of their part of the contract.

It is urged, though, by the defendants, that a breach of conditions cannot be taken advantage of by a stranger. But Burke and Hamilton themselves are claiming this forfeiture, and the fact of their having conveyed a certain interest [*55] in the premises to strangers who are joined with them as plaintiffs, surely should not deprive them of the right of taking advantage of the breach of conditions.

But this rule of the common law, that a condition cannot be reserved to any but the grantor and his heirs, I think has never been recognized as the law in this country, and it was completely overturned in England by the statute 32, Henry VIII, C. 34, which permitted grantees of reversions and privies in estate to take advantage of the breach of condition (4 Kent's Com. 126; 2 Cruise Dig., p. 4, Sec. 16); and in adopting the common law of England in this country, it seems to be the established doctrine that it is adopted as amended or altered by English statutes in force at the time of the emigration of our colonial ancestors. (1 Kent, 473; *Sackett v. Sackett*, 8 Pick. 309; *Patterson v. Winn*, 5 Pet. 233.) With this view of what constitutes the common law of this country, I am of opinion that the grantees of Burke and Hamilton could take advantage of the breach of condition by the defendants.

For these reasons we think the judgment below should be affirmed.

BEATTY, J., having been engaged as counsel below, did not participate in this decision.

By the Court, BROSAN, J., on petition for rehearing:

The petition for rehearing in this case presents a point now raised for the first time. It is urged that, by the organic act of the Territory of Nevada, all judicial power was vested in certain courts therein designated; that the motion for new trial was not acted upon by any tribunal specified in the act; that the order of Mr. Whitman, the referee, was not a judicial act, and as this court can only exercise judicial power of an appellate character, that action in this case is beyond the scope of its power; that it cannot entertain appeals from the decisions of private individuals.

We recognize the principle that consent of parties cannot confer jurisdiction, as we do that which holds that a person cannot take advantage of his own wrong.

*Final judgment was entered in the proper district [*56] court on the report of the referee, Mr. Taylor, on the 9th day of May, 1864.

By stipulation of parties a motion for new trial was made by appellants before Mr. W., and an order denying the motion was entered on the 11th day of July, 1864. On the following day the appellants gave notice of appeal to the supreme court of the territory, and filed the usual bond. Thus it appears that at the time of the organization of our State, the action was pending in the court of which this court is successor; and by the provisions of the Constitution, that appeal was transferred to this court upon the transition from a Territorial to a State government. *Vide* Art. XVII, Sec. 4, of the Constitution of Nevada. We think this point has no merit.

In our former opinion it is stated that in adopting the common law of England in this country, it seems established doctrine, that it was adopted as amended or altered by English statutes in force at the time of the emigration of our colonial ancestors. Counsel thinks this is erroneous,

Opinion of Brosnan, J., on petition for rehearing.

and asks that it be reconsidered. We have done so carefully, and find no reason for a change of opinion.

Chancellor Kent, after saying that the common law of England, so far as it is applicable to our situation and government, has been adopted as an entire system in several of the old States, adds: "It has been assumed by the courts of justice or declared by statute, with the like modifications, as the law of the land in every State. It is also the established doctrine that English statutes, passed before the emigration of our ancestors, and applicable to our situation, and in amendment of the law, constitute a part of the common law of this country." (1 Kent's Com. 473.)

Judge Story, in 5 Pet. 241, says: "Those statutes (English) passed before the emigration of our ancestors, being applicable to our situation, and in amendment of the law, constitute a part of our common law."

Bishop says: "A large proportion of the older English statutes are common law here, as by and by will be explained" (Bishop's Cr. Law, Sec. 10), and further [*57] adds (Sec. 11), "but *general statutes, amendatory, therefore, of the common law, came, and they constitute a part of the common law."

Sedgwick, in his work on Common Law, after a full review of authorities, writes: "The great body of the common law of England, and of the statutes of that country as they existed in 1776, are then, so far as applicable to our condition, the basis of our jurisprudence." (Sedgw. Stat. Law, 18.) But counsel reply that this doctrine embraces only the original States. In the words of the petition: "The thirteen original States of the Union were English colonies, peopled by Englishmen, and consequently come within the rule embraced by the court." The authorities recognize no such limitation, and upon principle there ought to be none. When the common law of England, consisting in part of statutes, as we have shown, has been adopted in the United States, why may not Americans, like the adventurous emigrants of other nationalities, carry with them the common law of their country into the Territories acquired since the *Revolution*?

Opinion of Brosnan, J., on petition for rehearing.

And whenever that law, without exception, is declared, as it has been here, to be the rule of decision, why shall it not prevail? In *Norris v. Harris* (15 Cal. 258), Chief Justice Field, after stating that the common law of England was repeatedly presumed to exist in the original States, and in those carved out of them, adds: "A similar presumption must prevail as to the existence of the common law in those States which have been established in Territories acquired since the Revolution, where such Territory was not, at the time of its acquisition, occupied as an organized and civilized community, when in fact the population of the new State upon the establishment of government, was formed of the emigration from the original States." This language possesses peculiar force in this State. Again, counsel say that the statute (32 Henry VIII) is confined to the assignability of breaches of conditions in law, as contradistinguished from conditions in deed. We have sought in vain for authorities to satisfy ourselves of this distinction. Certainly, the language of the statute does not make any. It is most general and comprehensive in its terms, was enacted to remove restraint of feudal law, and should not in this age be circumscribed in its operation. It has been acknowledged and pronounced to be a wise and just enactment. It reads: "All persons and bodies politic, their heirs, successors and assigns, etc., and also all other persons being grantees or assignees to the king, or to any other person or persons, and the heirs, executors, successors and assigns of every one of them, shall have the like advantage by entry, for non-payment of rent, for doing waste, or any forfeiture," etc.

Lord Coke, in commenting upon this statute, states his opinion of it as follows:

First. That the statute is general, viz.: That the grantee of the reversion of every common person, as well as of the king, shall take advantage of conditions.

Second. That this statute extends to grants made by the successors of the king, although the king only be named in the act.

Opinion of Brosnan, J., on petition for rehearing.

Third. That where the statute speaks of grantees and assignees of the reversion, an assignee of a part of the estate of the reversion may take advantage of the condition (Vid. 1 Cruise, title 13, ch. 2, secs. 55, 56.)

Chancellor Kent says in relation to it: "The statute has been formally re-enacted in some of the United States; and though the statute was made for the special purpose of relieving the king and his grantees, etc., yet the provision is so reasonable and just that it has doubtless been generally assumed and adopted as part of our American law." Kent, 127.)

It is, however, claimed, that notwithstanding a breach of condition, the estate can only be defeated by entry. This is stereotyped through the books but often misapplied. Entry was not necessary upon a breach, except where the condition was annexed to a freehold estate. In such a case there must be an entry or claim, for the purpose of determining the estate. But upon a breach of condition annexed to an estate for years, the estate *ipso facto* ceased the instant the condition was broken. (4 Kent, 133; 1 Cruise, tit. 13, ch. 2, secs. 42-45.) The estate claimed in this case was of a lower grade than an estate of freehold. The reason why an entry was requisite is, that as seisin passed by livery, the estate could revert only by an act [*59] equal to livery. The reason of the rule does not exist with us; and the reason ceasing, the rule itself ceases. *Cessante ratione, cessat, ipsa lex.*

But the members of the profession understand that the refinements and subtleties that marred and disfigured the law relating to real estate in England, have been dispelled by the experience and enlightenment of our day. At most only a demand of possession before suit is necessary with us. That is the equivalent of an entry, and it was sensibly made in this instance.

Our attention has been particularly directed to a case 12 Barb. 144, which is claimed to be an authority very much in favor of the appellants. The facts in that are very dissimilar to the facts in this case. In that, the plaintiff executed and delivered a deed of a strip of land in

Opinion of Brosnan, J., on petition for rehearing.

simple to a railroad company, conditioned that defendants should make and maintain fences, and complete the railroad by the first of January, 1843, in failure of which the deed should be void. The defendants did not finish the road until September, 1844. The plaintiff took no steps to enter for the breach of condition, nor did he assert his right to the possession in any manner, nor give any notice to the defendants until September, 1846 (nearly four years after the forfeiture), at which time he gave notice to quit. Suit was commenced in October, 1846. After the forfeiture, and a year before suit was brought, the plaintiff notified the defendant to put up the fences along the roadsides, which they did. He also used the road himself and rode in the cars long after the forfeiture, and without complaint or intimation of the breach of covenant to defendants, except as above stated.

The road cost twenty thousand dollars per mile in its construction, and would be useless if the plaintiff should succeed in his suit, which was ejectionment. It was held that he waived forfeiture, and could not recover the land; very properly, we think. In that case, so conclusive was the evidence of a waiver of the forfeiture, that any court must wink very hard not see it.

The court use this language: "No stronger evidence could be exhibited—short of the execution and delivery of a new deed—of a design to waive a forfeiture, and confirm the grant, than the facts to which I have adverted."

*Aside from any other consideration, if we should [*60] conclude that there had been a waiver of the forfeiture to put up the mill within the prescribed time, there was still the continuing condition in the agreement before the court, to keep the mine free from water; failing to do which, a breach of the condition daily recurred. To compare the case in Barber with the one before the court, would be to confound things.

If we entertained any doubt, however, as to the correctness of our conclusion, we would gladly grant a rehearing in this case; but we do not.

In conclusion: The petition states that our former de-

Opinion of the Court—Lewis, C. J.

cision rather strains a point to establish a forfeiture. The learned counsel who prepared it, we presume, does not expect any response to that most pregnant part of his argument.

A rehearing is denied.

**HAMILTON ET AL., APPELLANTS, v. KNEELAND ET AL
RESPONDENTS.**

[1 NEVADA, 60.]

WRIT OF ERROR, WHEN GRANTED.—The cases enumerated in the twenty-first section of the judiciary act of Congress are the only ones in which a writ of error can issue to the supreme court of the United States.

IDEM.—Although it is not indispensable that the record should show by direct and positive statement that some of the questions enumerated in section twenty-five of the judiciary act were passed upon by the State court to authorize a writ of error to the supreme court of the United States, yet it must appear by just and necessary inference that some of those questions were made, and that the court could not have arrived at the judgment pronounced by it without passing upon one or more of them.

APPEAL TO SUPREME COURT OF UNITED STATES—WHEN CANNOT BE TAKEN.—The right of appeal must be governed by the laws in force at the time the appeal is taken. A case commenced in the territorial courts and appealed to the supreme court of the Territory, but decided by the supreme court of the State of Nevada, cannot be taken to the supreme court of the United States, merely because the organic act of the Territory allowed it at the time the action was commenced. Such an choate right of appeal is not a vested right.

IDEM—BETWEEN CITIZENS OF DIFFERENT STATES.—The fact that the parties to an action were citizens of different States does not authorize an appeal to the supreme court of the United States after decision by the supreme court of the State.

APPLICATION for writ of error.

[*61] * By the Court, LEWIS, C. J.:

At the present term of this court, the judgment of the Territorial district court for the county of Storey having been affirmed in this case, the defendants now make an application to me, under the act of Congress entitled “An Act to establish the judicial courts of the United States

Opinion of the Court—Lewis, C. J.

for a writ of error to take the case to the supreme court of the United States.

Though firmly believing at the time the application was made that the case did not come within the twenty-fifth section of that act of Congress, and therefore that a writ of error should not issue, yet the value of the property in dispute, and a desire to have the decision of this court reviewed, if it were possible, have induced me to hear counsel on behalf of the appellants, and to give the question the most thorough examination; but I have been unable to find any authority, either on principle or precedent, for allowing the writ in this case. And in arriving at this conclusion, I have not ignored the general rule observed in applications of this kind—that if any doubt exists as to the right, the writ should be allowed.

I think it is not claimed by appellants that it is a writ of right, and should issue *ex debito justitiæ*, but rather that it rests in the discretion of the judge to whom the application is made.

Though the entire responsibility of passing upon this question, so far as the application in this court is concerned, rests solely upon me, I have not failed to avail myself of the counsel of my associate who was engaged with me in the hearing of the cause, and I am permitted to say that he fully concurs with me in the conclusions to which I have arrived.

In the consideration of this question it must be borne in mind that a writ of error could only be allowed in this case, if at all, by the authority of the twenty-fifth section of the act of Congress known as the judiciary act, which declares “that a final judgment or decree in any suit in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under any State, on the *ground of their being repugnant to [*62] the Constitution, treaties or laws of the United States, and the decision is in favor of such their validity, or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission

Opinion of the Court—Lewis, C. J.

held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party under such clause of the said Constitution, treaty, statute, or commission, may be re-examined and reversed or affirmed, in the supreme court of the United States upon a writ of error, the citation being signed by the chief justice, or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by justice of the supreme court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a circuit court and the proceeding upon the reversal shall also be the same except that the supreme court, instead of remanding the cause for a final decree as before provided, may, if the cause shall have been once remanded before, proceed to final decision of the same and award execution. But no other error shall be assigned or regarded as the ground of reversal in any such case as aforesaid than such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said constitution, treaties, commissions, or authorities in dispute."

The cases enumerated in this section are the only ones which the supreme court of the United States has a revisory power over the decisions of the highest court of a State. The decision in this case being the judgment of a State court, it must be shown that some one of the questions enumerated in this section was passed upon by it, to authorize the issuance of the writ of error applied for by the appellants. It has been held that it is not *indispensable* that that fact should appear upon the record *in totidem verbis*, or by direct and positive statement, but if it does not, it must appear clear from the facts stated, by just and necessary inference, that the question was made, and that the court

below must, in order to have arrived at the judgment [*63] pronounced by it, have *come* to the very decision of that question as *indispensable* to that judgment (*Crowell v. Randall*, 10 Pet. 368; *Armstrong v. Treas.* &

Athens County, 16 Pet. 281; *Satterlee v. Matthewson*, 2 Pet. 380.)

Does this case, then, come within this rule so frequently announced by the supreme court of the United States? I think not. It nowhere appears in the record by direct and positive statement, or inferentially, as *indispensable* to the judgment pronounced by it, that any of the questions enumerated in section twenty-five of the judiciary act were passed upon or indeed even raised in the case. If, as a matter of fact, any of these questions were involved in the judgment—but the record did not show that fact as required by the rule—it would avail the appellants nothing. There must not only be the decision of some one of these questions, but it must also appear by the record to have been raised and passed upon by the State court. *Quod non apparet non est.*

To sustain this application, it is claimed on behalf of the appellants that the decision of this court involved a right claimed by them under the organic act of the Territory of Nevada; that that act having vested all judicial power in a "supreme court, district courts, probate courts and justices of the peace," it was their right to have their motion for a new trial heard and determined by the court; and that the decision of the referee, overruling the motion, was nothing more than the act of a private individual, and of no force or effect; that in sustaining the appeal and affirming the judgment of the court below, this court conferred judicial power upon the referee, and deprived the appellants of the right of having their motion for new trial heard and determined by the district court. And thus it is claimed the record shows that the decision of this court involved the construction of an act of Congress, and deprived appellants of a right claimed under it. The facts, as they appear of record, I think warrant no such conclusion.

It appears that on the 2d day of April, A.D. 1864, this cause was referred, by order of the district court of Storey county, to a referee to report the facts and a judgment. After a full hearing before the referee, he, on the 9th day of *May following, reported his findings of fact [*64] and a judgment in favor of the plaintiffs, which re-

Opinion of the Court—Lewis, C. J.

port was on the same day confirmed by the district court, and a judgment entered in accordance with the report of the referee. On the 29th day of June, A.D. 1864, by the consent of counsel, the motion for a new trial, which was made by defendants, was also referred to a referee, who, on the 11th day of July, overruled the motion, and the following day an appeal is taken to the supreme court of the Territory of Nevada, the notice of which states that the appeal is taken "from the judgment made and entered by the above-entitled district court on the 9th day of May, 1864, in favor of the plaintiffs and against the defendants; and also from the order of said court made in said cause on the 11th day of July, 1864, denying the motion of defendants for a new trial of said cause."

From this notice of appeal it would appear that the motion for new trial was actually made by defendants before the district court, and it is from the action of that court overruling the motion, and the final judgment rendered by it, that they appeal, and not from any proceeding of a referee.

How, then, does the decision of this court deprive them of the right which they claim, of having their motion for a new trial determined by a proper tribunal? If this notice of appeal is to have any weight, the referee is entirely out of the case, and I am unable to see how the affirmance of the judgment of the district court involved the decision that the referee had the power to hear the motion for new trial, or that an appeal would lie from his proceedings. To do so the court would have to decide a point not presented by the record, and entirely unnecessary for it to decide in affirming the judgment below. But if it be admitted that the appeal in fact is from the judgment of the court and from an order of the referee overruling the motion for new trial, the appellants will occupy no better position upon this application, because even then the case would not come within the rule laid down in the case of *Crowell v. Randall*, and the other authorities cited above. The record would not, even by implication, show that the point suggested by them, or any of the questions enumerated in the twenty-

Opinion of the Court—Lewis, C. J.

h section of the judiciary act, was involved in the decision of the court. Indeed, the most favorable [*65] instruction which can be put upon it, is that the appellants waived their motion for new trial, and appealed simply from the judgment of the court. This may be done, and if an appeal be taken from the final judgment before a determination of the motion for new trial, and the appeal is pressed in the appellate tribunal before any move is made to have it disposed of, the only legitimate conclusion which could be drawn from such conduct would be that the motion had been waived. The appellants had a right to appeal from the judgment of the court below, even during pendency of the motion; and if their position be correct, they did so, and the case came properly before this court. If that be done, the respondents have no cause of complaint. It is the appellants' rights alone which are affected by it; and there being an appeal from a final judgment, I see no reason why the appellate tribunal should not pass upon it. If an appellant wishes to rely upon an appeal from a final judgment of an inferior court, and to waive the rights which a motion for new trial would give him, I know of no reason why he should not be permitted to do so. And this is the position which the appellants occupy before us, if it be correct that the motion for a new trial has not been determined, or that the order of the referee was merely the act of a private individual. No appeal could be taken from such order; consequently this must be taken to be an appeal simply from the judgment rendered by the district court. We could not review the order of the referee in this case, but we could inquire as to whether the judgment of the district court was sustained by the findings of fact reported; and so, it was the duty of this court to affirm it. If there was no final judgment, and the appeal was from an order of a referee overruling a motion for a new trial, the question would assume a very different aspect. In that case the appellate tribunal in sustaining such order, would necessarily have to decide that the referee had the power to make it. But no such necessity exists in this case, as there is no appeal from any order of a referee, or if it be admitted that

HAMILTON v. KNEELAND.

Opinion of the Court—Lewis, C. J.

is, the appeal having also been taken from the final judgment of the district court, the decision of this court affirming that judgment would not necessarily involve the decision that the referee had, or had not, power to hear and determine a motion for new trial; for stated before, the appellants having questioned the power of the referee, and his order being the *mero ipse dixit* of a private individual, having none of the elements of judicial action (as claimed by appellants), the only rational conclusion which we can draw is, that they waived a determination of the motion for new trial, and relied entirely upon the appeal from the judgment of the court. Is it clear, then, from the facts stated on the record, by just and necessary inference, that any question was made by this court as to the power of the referee, and in order to have arrived at the judgment pronounced, was the decision of that question indispensable? Would it be just to presume that the court passed upon a question not presented by the record, and which was not necessarily involved in the judgment pronounced? Clearly not. The writ of error therefore should not issue. (*Wilson v. The Blackbird Creek Marsh Association*, 7 Pet. 245; *Hickie v. Stark*, 1 Pet. 94; *Laws U. S. Courts*, 122, note.)

But the chief point upon which the appellants claim the issuance of this writ is, that the right of appeal which existed under the Territorial government at the time this action was commenced survives, and is not affected by the change in our form of government. This position in effect simply amounts to this, that that portion of the organic act of the Territory of Nevada which authorized an appeal from the final decision of the supreme court of the Territory to the supreme court of the United States, is still in force as to those cases which were commenced prior to the adoption of the State government, or that the right of appeal, as it existed by the laws in force at the commencement of the action, became a vested right in appellants. If it can be said that the appellants had a right of appeal at all before judgment was rendered against them, or order n

Opinion of the Court—Lewis, C. J.

affecting their rights, it was of that contingent, uncertain and shadowy nature, that it could scarcely be called a vested right. But admitting this vested right to exist, what was it? Simply the right to appeal from the final decision of the supreme court of the *Territory*, and not from *the final decision of the supreme court of the [*67] State. The organic act from which the right is claimed, provides that "writs of error and appeals from the final decision of said (Territorial) supreme court shall be allowed, and may be taken to the supreme court of the United States," but there is no final decision of the supreme court of the Territory in this case; *ergo*, no writ of error should issue, and no appeal can be taken. Again, the provision of our State Constitution which declares, "that all rights, actions, prosecutions, judgments, claims," etc., "shall continue as if no change had taken place," cannot possibly help this application. If the appellant have the right to claim the issuance of this writ, it must be independent of our State Constitution. The supreme court of the United States would scarcely respect the jurisdiction conferred upon it by the fundamental law of the State of Nevada.

As the writ of error in this case would be issued from a State court, the supreme court of the United States would not look to the Constitution of this State to ascertain if the rights of the appellants were preserved by it, but would only inquire if the case came within the twenty-fifth section of the judiciary act. That section specifies all the cases in which the decision of the highest court of a State can be re-examined by the supreme court of the United States, and if this case does not come within it, vested rights and State Constitutions would not be looked to for the power to assume jurisdiction of it. The fact of a case having been commenced in the Territorial court, does not bring it within that section.

One further point made on this application remains to be disposed of, which is, that the parties to the action are citizens of different States. While this fact, which here nowhere appears upon the record, would be sufficient to

Opinion of the Court—Lewis, C. J.

give the Federal courts jurisdiction in the first instance, am unable to see how it can be taken advantage of after final judgment on an application of this kind. It is not one of the cases specified in the section quoted above, in which a writ of error may be issued, and the appellate power of the supreme court of the United States in this respect is strictly limited to the cases given in that section. For these reasons I have deemed it my duty to deny this application.

SAMUEL SANKEY, RESPONDENT, v. J. W. NOYES ET AL
APPELLANTS.

[1 NEVADA, 68.]

PLEADINGS—WHEN REPLICATION MAY BE DISREGARDED.—Where a complaint in ejectment charges the defendants with being in possession of certain premises, and the answer admits the allegation, a replication repugnant to that allegation, and denying that the defendants are in possession, does not entitle defendants to judgment on the pleadings. The replication may be disregarded.

POSSESSION OF PUBLIC LAND.—What acts are sufficient to constitute such possession of public land as will maintain ejectment, must, in a general measure, depend upon the character of the land, the locality, and the object for which it is taken up.

KIND OF POSSESSION NECESSARY TO MAINTAIN EJECTMENT.—Possession is *prima facie* evidence of title and sufficient to maintain ejectment, but when possession alone is relied on, it must be an actual *bona fide* occupation. The mere staking off of land without occupation or other act of ownership would not constitute such a possession as would maintain ejectment.

APPEAL from the District Court of the First Judicial District of the Territory of Nevada, Storey County, Hon. J. W. NORTH presiding.

The facts appear in the opinion of the court.

A. B. Elliott, for Appellants.

[*69] *By the Court, LEWIS, C. J.:

Two questions are presented for our consideration in this case.

(1) 2 Nev. 280; 4 Nev. 50; 5 Nev. 44; 9 Nev. 21; *Eureka M. & S. Co. v. Way*, 11 Nev.

Opinion of the Court—Lewis, C. J.

First. Are the defendants entitled to judgment upon the pleadings? and

Second. Are the findings of fact reported by the referee sufficient to warrant a judgment in favor of the plaintiff?

There having been no settled statement or motion *for new trial, we cannot pass upon the sufficiency of [*70] the evidence to warrant the findings; neither can we inquire into any errors of law which may have been committed at the trial.

The complaint contains the usual allegations in ejectment of ownership and right of possession in plaintiff, and ouster by the defendants. The answer denies the ownership of plaintiff and the ouster; but alleges that the defendants are the owners of the premises in dispute, and as such are in possession, and are entitled to the possession thereof.

Here a direct issue is raised upon the right of possession of the premises in dispute, and no such new matter is set up in the answer as would make a replication necessary, but the plaintiff, perhaps thinking it necessary to controvert every affirmative allegation on the part of the defendants, files a replication, in which he denies that the defendants are in possession of the premises, thus, in fact, denying one of the allegations of his own complaint. This may place the plaintiff in a novel position upon the record, but I do not think it destroys the issue raised by the complaint and answer, so as to entitle the defendants to judgment upon the pleadings. The issue was completely made up in the complaint and answer, and the replication was frivolous, and might have been stricken out on motion. The defendants admit that they are in possession of, and claim title to, the premises; had they not done this the replication would have been fatal to the plaintiff's recovery; but to hold so here would be to disregard the complaint and the sworn answer of the defendants. As the replication was uncalled for by the answer and frivolous, I think it should be treated as if it were not in the case.

This brings us to the second point, which involves the merits of the case; that is, are the findings of fact by the referee sufficient to warrant the judgment in favor of

Opinion of the Court—Lewis, C. J.

plaintiff? I am of opinion that they are. The facts reported by him are as follows:

First. In the month of July, 1861, these defendants, wit, John B. Hickey, Richard A. James, and C. S. Babbitt staked off a piece of ground, which included within its limits about one-half of the land now in dispute.

[*71] *The boundary of the claim was distinctly marked by short posts. But within a month or less after these posts were set, those on the southwest end and side were taken up and carried away.

In June, 1862, the same parties made out a written notice setting forth the facts that they had staked off this piece of ground the previous year, and that they claimed the same and had this notice recorded.

Second. In June, 1863, plaintiff caused a survey to be made of the ground now claimed by him. Immediately thereafter he commenced clearing the same; cleared off one or two acres of the same on the west side of the piece claimed; he fenced the piece on the south and east sides with a substantial fence, and had grubbed out the ground for the other two strings of fence preparatory to fencing the entire lot.

Third. Whilst the plaintiff was fencing the ground in dispute, with a *bona fide* intention of occupying and using the same, he was driven from the premises by the threats and violence of one McIntosh, who was at the time in the employ of defendants Hickey, Roads and James, building fence or setting posts for them; Roads was also present, giving countenance and aid to those threatening demonstrations of McIntosh.

The only act which appears to have been done by the defendants to indicate their intention to claim the premises was to stake off the same in July, 1861, and the recording of a notice in 1862. Nothing else appears to have been done by them up to the time the plaintiff claimed and went into possession of the premises, and the referee finds that the posts which the defendants placed around the claim in 1861, were removed from two sides thereof in less than a month afterwards.

Opinion of the Court—Lewis, C. J.

What acts are sufficient to constitute such a possession of public land as will maintain ejectment, has long been a vexed question in the courts of California, and our own courts have found it impossible to announce any general rules that would meet the varying circumstances of every case. But it seems to be generally agreed that these acts must in a great measure depend upon the character of the land, the locality, and the object for which it is taken up. While arable or meadow land should be inclosed with a substantial fence, cultivated and *improved, land [*72] which is only valuable for the timber upon it might be held by a much less substantial inclosure, and cultivation or improvement would not be necessary. But one thing I think should be observed in every case; that is, possession, when solely relied on, should be a *pedis possessio*, an actual occupation, a subjection to the will and control. In this country, where no higher title to land exists than that which the law presumes from possession, and where all persons are permitted to locate upon any public land not previously occupied or appropriated, justice to the community requires that that possession should be open, notorious and continuous, and that it should be a *pedis possessio*.

In the case of *Plume v. Seward* (4 Cal. 95), Chief Justice Murray uses the following language: "At the last term of this court we decided possession was *prima facie* evidence of title, and sufficient to maintain ejectment. What acts of ownership were necessary to constitute possession was not involved in that decision. From a careful examination of the authorities, I am satisfied there must be an actual *bona fide* occupation; a *possessio pedis*; a subjection to the will and control as contradistinguished from the mere assertion of title and the exercise of casual acts of ownership, such as recording deeds, paying taxes," etc.

The mere staking off of land, without occupation or other acts of ownership, would not constitute such a possession as would maintain ejectment, unless those acts were closely followed up by other and continuous acts of ownership. In this case, the defendants are attempting to hold upon the mere act of placing posts around the land in July, 1861,

Statement of Facts.

and the recording of a notice of their claim in June, 1862. To hold that these acts would be sufficient to enable the defendants to hold the premises against the plaintiff, who subsequently located, improved, and occupied them, would be against authority and the best interests of the community.

The judgment below must be affirmed.

BEATTY, J., did not participate in this decision.

CHOATE & BROWN, APPELLANTS, v. THE BULLION MINING COMPANY, RESPONDENT.

[1 NEVADA, 73.]

¹ CONTINUANCE WITHIN DISCRETION OF COURT.—A motion for a continuance is always addressed to the sound discretion of the court, and should not be interfered with except where there has been a manifest abuse of discretion.

APPEAL from the District Court of the First Judicial District of the Territory of Nevada, Hon. J. W. NORRIS presiding.

The affidavit on motion for continuance in this case shows that affiant is the superintendent of the Bullion Mining Company, the defendant; that defendant could not safely proceed to trial during that term of the court because of the absence of one M. E. Letts, a material witness on the part of defendant; that Letts left the Territory of Nevada for the State of California in the month of November, 1862, and left said State in March, A. D. 1863; that immediately after arriving in said State he, the said Letts, in company with others started to Lower California on a prospecting tour, and has been absent ever since; that immediately after this suit was commenced the affiant wrote to different places in order to ascertain his whereabouts so that his deposition might be taken, but that all his efforts to ascertain his whereabouts had failed; that said Letts was intending to return to Virginia City, and affiant believed that he would so return before the

(1) 6 Nevada, 320; 9 Nevada, 308.

Opinion of the Court—Lewis, C. J.

next term of the court; that affiant had written to every place where said Letts might be expected to get his letters, yet that he had received no answer; that Letts's business is such that affiant knew he would return before many months.

The affidavit also stated the facts which defendant expected to prove by said witness; that affiant knew of no one else by whom the same facts could be proved, and that his testimony could be obtained by the next term of the court.

**Robinson & Foster*, for Appellant.

[*74]

J. R. McConnell, for Respondents.

By the Court, LEWIS, C. J.:

At the trial of this cause before the referee, the defendant moved for a continuance, on the ground of the absence of a material witness.

The referee refused to grant the continuance, defendant excepted, and this is one of the grounds relied on for a reversal of the judgment which was in favor of the plaintiffs.

A motion for a continuance is always addressed to the sound discretion of the court, and should not be interfered with except where there has been a manifest abuse of that discretion. In this case we think the affidavit upon which the continuance was claimed meets all the requirements of the statute, and the continuance should have been granted.

Other grounds for a reversal of the judgment are relied upon by the appellants, but as this is sufficient to authorize the reversal of the judgment, it is unnecessary to pass upon them.

Judgment reversed and a new trial ordered.

Opinion of the Court—Beatty, J.

GEORGE S. SAWYER, APPELLANT, v. THOMAS E.
HAYDON, RESPONDENT.

[1 NEVADA, 75.]

¹ **ELECTIONS, WHEN HELD.**—Under our form of government there is no inherent right in the people to hold an election to fill any office. An election can only be held by virtue of some constitutional provision or legislative enactment, either expressly or by direct implication authorizing that particular election.

IDEM—VACANCIES IN OFFICE.—A law authorizing the electors of a county biennially to elect a person to fill a certain office, does not, even by implication, authorize them at an intermediate election to choose a person to fill out an unexpired term of the same office; especially is this where there has been an appointment made to fill the vacancy by legislative authority, and there is no law limiting this appointment to a period short of the expiration of the unexpired term.

APPEAL from the District Court of the Second Judicial District of the Territory of Nevada, Hon. GEORGE TURNER presiding.

The facts of the case are stated in the opinion of the court.

Clayton and Atwater & Flandreau, for Appellant.

Thomas E. Haydon, in person, for Respondent.

[*76] *By the Court, BEATTY, J.:

This case came before the district court of Ormsby county, as an agreed case, under the following circumstances:

At the September election, 1863, Samuel D. King, Esq. was elected prosecuting attorney for Ormsby county, and held the office until the 3d day of October, 1863, when he resigned, and T. D. Edwards, Esq., was appointed by the board of county commissioners to fill the vacancy. Edwards held the office until the 10th day of February, 1864, when he resigned, and the defendant (respondent) was appointed to fill the vacancy occasioned by this resignation, and entered upon the duties of the office. Prior to the September general election, 1864, proper notice was given that a pro-

Opinion of the Court—Beatty, J.

executing attorney for Ormsby county would be elected. The plaintiff was a candidate, and received a majority of the votes cast for that office, received his certificate of election, took the necessary oath and demanded of [*77] respondent to be let into office. The defendant refusing to let him into office or to allow him to control the books or papers belonging thereto, an agreed case was submitted to the district court, and a decision was had therein in favor of the defendant. The plaintiff appeals to this court.

The only question to be determined is, was the election held in September, 1864, for prosecuting attorney for Ormsby county, a legal election, or was it a proceeding without the authority of law, and void?

By a law of the Territory of Nevada, passed December, 19, 1862 (Stat. 1862, 64), it is provided that at the next general election prosecuting attorneys shall be elected for each of the counties of the Territory, who shall hold their offices for two years and until their successors shall be elected and qualified.

In the Laws of 1861, p. 308, the following provisions are found in regard to filling vacancies:

"SECTION 44. Whenever a vacancy shall occur during the recess of the legislature, in any office which the legislature are authorized to fill by election, or which the governor, subject to confirmation of legislative council, is authorized to fill, the governor, unless it is otherwise specially provided, may appoint some suitable person to perform the duties of such office.

"SEC. 45. When, at any time, there shall be in either of the county or precinct offices, no officer duly authorized to execute the duties thereof, some suitable person may be appointed by the county commissioners to perform the duties of either of said offices; provided, that in case there is no board of county commissioners, the governor may, on notice of such vacancy, create or fill such board.

"SEC. 46. Every person so appointed, in pursuance of either of the last two preceding sections, shall, before proceeding to execute the duties assigned them, qualify in the same [manner] as required by law of the officers in whose

Opinion of the Court—Beatty, J.

place they shall be appointed; and they shall continue to exercise and perform the duties of the office to which they shall be so appointed, until such vacancy shall be regularly supplied as provided by law."

[*78] *These are believed to be the only laws of the late Territory, now State of Nevada, bearing on the points at issue in this case. It is urged on the part of the appellant,

"First. That the general policy of the territorial laws was to make all offices elective as far as practicable, and when a case of necessity arose requiring the temporary appointment of an elective officer, that appointment should not extend, and was not by law intended to extend, beyond the next general election when the people would have an opportunity of electing.

"Second. That the law having vested the people with power to elect prosecuting attorneys for the full term, that they would have the right without any special statute on the subject, when assembled at a general election, to fill any vacancy in that office that might then exist, and also to elect an officer to fill the unexpired term when the vacancy had been temporarily filled by the county commissioners."

We shall not question the general proposition that it was the policy of the territorial legislature to make all offices elective. That proposition can have little to do with determining the point in issue. It must also be admitted that the language used in the 46th section of the act of 1861 shows that the legislature contemplated that the filling of vacancies by the county commissioners should only be temporary. It was evidently the intention of the legislative assembly to provide for filling those vacancies in some other manner.

Probably in those offices which were elective, and in which the term of office was more than one year, the legislature may have intended to provide that at the next general election after any vacancy occurred, an election should be held to select an officer to fill the unexpired term. But whatever may have been their intention, they have failed to carry it into effect. No law was passed to authorize an

Opinion of the Court—Beatty, J.

election by the people to fill a vacancy, or to elect for a fractional term.

The question, then, resolves itself into this: Can the people, by virtue of any inherent right in themselves, when assembled at a general election, elect an officer for a fractional term when the statute law authorizes them to elect for the full term, but is silent in regard to the election of such officer for a fractional term?

*We can imagine that a people without written laws [*79] might have a natural right to assemble together, and in a general meeting of all classes, adopt laws, elect officers, and perform governmental functions.

But when a people live under a government which is regulated by written law, in which the powers, duties, and responsibilities of the different officers of the government and of the body of the people are clearly defined, and in which the law attempts to point out how and when citizens may exercise the elective franchise, and for what officers they may vote, we cannot conceive of a case in which the people could be entitled to vote for any officer without some provision of law, either express or clearly implied, authorizing such vote to be cast. According to our understanding of the theory of our government, all legislative power, whether in a state or territorial organization, is vested in a body consisting of a limited number of persons, and the people derive their power to elect officers either from the State constitution, the organic act (which in a territory, to some extent, stands in the place of a constitution), or the statutory enactments of a state or territorial legislature.

If that be the case, then it is impossible for a people living under a regularly organized territorial government to vote for and elect any officer without some statutory provision for so doing. It is not pretended that there is any express statutory provision for electing a prosecuting attorney to fill the unexpired term.

But appellant contends that power is given by implication. As before stated, the inference we draw from the language in section 46, p. 303, Statutes of 1861, is not that the legislature thereby gave, even by implication, any power

Opinion of the Court--Beatty, J.

to the people to fill vacancies or supply unexpired terms but rather intimated an intention to do so at some future time—an intention which they failed to carry out.

The proposition that the power conferred on the people to elect for a full term carries with it, by implication, the power to fill the office by election for an unexpired term, is considered untenable. There is no case cited where the people

have ever attempted to claim or exercise such a right. [*80] Many cases have arisen where the voters have claimed and attempted to exercise such a right under the express provisions of State constitutions, when the statute law had failed to provide for carrying the constitutional provisions into effect, or when the executive had failed to issue the proper proclamation.

There has been great conflict of opinion among judges as to what were the powers of the people at a general election under such circumstances, some holding that merely by force of the general provisions of the Constitution the electors might exercise their right to elect their own officers, and that they could not be deprived of their constitutional right in this respect by the failure of the legislative or executive departments of the government to do their duty. Other judges have again held that this elective franchise, although guaranteed in general terms by the Constitution, could be exercised only by virtue of special legislative enactments describing time, place, manner and all the formalities of the election, and under some circumstances that such election must also be preceded by all proper notices and proclamations.

But we think no court or judge has gone so far as to hold that the people might hold an election or vote for any particular officer at a general election, unless special provision was made for electing such officer for the particular term which he was seeking to be elected, either in the Constitution or some statutory enactment. For an able and luminous argument on these points we would refer to the opinion of Mr. Justice Baldwin in the case of *McKune v. Weller*, 120 Cal. 49.

An opinion of Justice Murray, in rendering the decision

Opinion of the Court—Beatty, J.

of the Supreme Court of the State of California, in the case of *The People v. Fitch* (1 Cal. 536), is relied on with great confidence by counsel for appellant. In that decision this language is used: "The power to appoint to an office, carries by implication the power to fill a vacancy in such, and all necessary authority to carry out the original power and prevent its becoming inoperative." The language of Mr. Justice Murray had reference to the powers of a legislative body, and not to the body of the people.

We apprehend that the rule, as applied to the two bodies, might be very different. When power is given to a legislative *body to elect or appoint an officer, [*81] that is all that is necessary.

From the very nature of such bodies, they may themselves fix the time, place, and manner of election.

They may arrange all the details for carrying the power into effect. It may well be held that conferring on such a body the right to appoint to such an office gives by implication the right to appoint as often as there is a vacancy either by expiration of term, death, or resignation.

But when the people are authorized to elect to an office, something more must be done. They not having the means of fixing the time, place, and manner of exercising the elective franchise, the law must fix it for them, either expressly or by implication. A law which authorizes the people to vote at a general election in the year 1863, for an officer to hold office for two years, cannot be said, even by implication, to authorize the people at the general election in 1864 to vote for a person to fill the same office for the unexpired term of the first incumbent who has died, resigned, or been removed, unless it contain some expression indicating that such was the intention of the legislature. There can be no doubt that the legislature might confer upon electors the power to vote for an officer to fill a whole or fractional term without using language the most direct and positive in its terms. But it must be language which, when properly interpreted, shows it to have been the intention of the legislature to confer such powers. In this case, had the law of 1862, after providing for the election of

Points decided.

prosecuting attorney for two years, gone on in the same law to provide that in case of vacancy the county commissioners should fill that vacancy until the next general election, and no special provision had been made to fill for any period reaching beyond the next election, perhaps it might be said here was a case where the legislature has by direct language, conferred upon the electors of the county the right, at the general election, biennially to elect a prosecuting attorney, and had by implication conferred on them the power to elect for a fractional term. It would be necessary to put this construction on the act or leave the office vacant.

But if the language used in relation to the vacancy [*82] to be filled "by the county commissioners" was that such appointees should hold until the vacancy should be regularly supplied as provided by law, then no such interpretation could be put upon the law. But we must rather infer that it was the intention to pass a law in regard to vacancies in the office. Such law might provide for a special election to be called to fill the vacancy. It might provide for an election at the general election. It might provide for an appointment by the legislature, or for any other method that the legislative body might think best.

We are of opinion the judgment should be affirmed, and it is so ordered.

A. S. PAUL ET AL., APPELLANTS, v. E. J. ARMSTRONG
RESPONDENT.

[1 NEVADA, 82]

¹ CERTIORARI, WHEN NOT INHIBITED.—A writ of *certiorari* is not inhibited in a party aggrieved in all proceedings or actions wherein a right of appeal is given.

² APPEAL WILL NOT LIE FROM A JUDGMENT BY DEFAULT. *Per Brosnan*, 4

³ PROBATE COURT—ISSUES TRIABLE ON APPEAL.—The probate court cannot try the issues that have been tried in the court below.

(1) See 8 Nev. 157.

(2) See 1 Nev. 314. *Held*, in 3 Nev. 381, that this is not an authoritative declaration of the court.

(3) 8 Nev. 84; 9 Nev. 355.

Opinion of the Court—Brosnan, J.

JUDGMENT, WHEN CANNOT BE REVERSED.—A court of appellate jurisdiction cannot reverse a judgment produced by the voluntary act of a party.

JURISDICTION—STATUTORY MODE OF ACQUIRING MUST BE COMPLIED WITH.—

Where a statute prescribes the mode of acquiring jurisdiction, that mode must be complied with or the proceedings will be a nullity.

FORCIBLE ENTRY AND UNLAWFUL DETAINER—DEMAND FOR POSSESSION MUST BE MADE.—A demand of possession must be made by the landlord before bringing suit against his tenant for holding over.

IDEM—JUDGMENT OF CONFESSION NOT AUTHORIZED.—Judgment upon confession cannot be entered in a justice's court in an action for forcible entry and unlawful detainer. *Per Brosnan, J.*

JUSTICE'S COURT OF LIMITED JURISDICTION.—Courts of justices of the peace being of special and limited jurisdiction, can take nothing by intendment or implication.

JURISDICTION NOT ACQUIRED BY CONSENT.—Consent of parties cannot give jurisdiction. *Per Brosnan, J.*

WRIT OF RE-RESTITUTION, POWER OF COURT TO GRANT.—The probate court has the power to issue a writ of re-restitution, in an action of forcible entry and unlawful detainer, brought before it on *certiorari*.

APPEAL from the Civil Probate Court of Storey County, Territory of Nevada, Hon. L. W. FERRIS presiding.

The facts appear in the opinion of the court.

Robinson & Foster, for Appellants.

Perley & De Long, for Respondents.

*By the Court, **BROSNAN, J.:**

[*93]

On the 25th day of March, 1864, Paul and Bateman, the appellants, demised the International Hotel in Virginia City to the respondent Armstrong for one year, at the yearly rent of fourteen thousand four hundred dollars, payable monthly, in United States gold or silver coin, at the rate of one thousand two hundred dollars per month in advance. The lease contains conditions that upon non-payment of rent as therein stipulated, "or if the rent be paid in legal tender on the part of the lessee," the lessors should have the right to re-enter, etc. The lessee also agrees to waive all demand in writing, or demand of any kind, for rent, when the same may become due; and waive all notice to quit or pay said

Opinion of the Court—Brosnan, J.

rent. It is further covenanted on the part of the lessee, that should the lessors "deem it necessary to commence legal proceedings to obtain possession for any ground of forfeiture upon which the right of recovery might depend," in such case the lessee "waives all summons [*94] *and notices, and authorizes the law firm of Robinson & Foster, or either of them, to enter the appearance and to confess judgment therefor." The lessee did not pay the rent for the month of July in gold or silver, but did pay it in legal tender notes. For this breach a right of re-entry is claimed.

On the 26th day of August, 1864, the appellants instituted suit before Atwill, justice of the peace, and filed a complaint under the forcible entry and unlawful detainer act, to recover possession of the demised premises. The complaint contains no averment of a demand of rent or possession before suit, but refers to the lease as part thereof. The breach, as alleged, is "that the defendant did not, on the 25th day of July, 1864, pay to the plaintiffs the sum of one thousand two hundred dollars in United States gold or silver coin for one month's rent. But on the contrary, he did on that day pay the amount of rent then due in United States legal tender notes."

On the day the complaint was filed, J. C. Foster filed with the justice's court a writing entitled in the action and signed by him as attorney for defendant. It is in the following words:

"Now comes J. C. Foster, one of the firm of Robinson & Foster, attorney for defendant, E. J. Armstrong, and hereby enters the appearance of the defendant, waiving summons, notice and time, and consents that judgment may be entered for said plaintiffs, according to the prayer in said complaint against said defendant, as fully empowered by said lease, a copy of which is attached to said complaint."

On the same day judgment was given against the defendant for restitution of the premises and costs of suit, based upon Foster's confession. A writ of restitution was issued thereon, and Armstrong was forthwith dispossessed. The defendant had no notice whatever of the pendency of the action until he was so dispossessed under the writ.

Opinion of the Court—Brosnan, J.

On the 2d day of September, the defendant gave notice of an appeal to the probate court, and filed an undertaking; but afterwards, on the same day, withdrew the appeal and all proceedings to perfect the same, and gave notice of a motion for a new trial before the justice, founded upon affidavits. On the 5th day of September, the counsel of Paul & Bateman moved to have this motion dismissed on the ground that the justice *had lost jurisdiction be- [*95] cause of the appeal. The motion was denied. Afterwards the motion for a new trial was partially argued, and further argument continued until the 8th day of September, at which time a writ of *certiorari*, allowed by the probate judge, was served upon the justice, on the part of the plaintiffs. Before return was made to this writ, the defendant also obtained a *certiorari* on his part, which was also served on the justice and return made by him to the probate court. After a hearing the court reversed the judgment of the justice and all subsequent proceedings, adjudged them to be void, and ordered a writ of re-restitution to reinstate the defendant in the possession. This appeal is from that judgment.

The counsel for appellants insists that the respondent's only remedy was an appeal from the judgment of the justice to the probate court; and in support of this view reference is made to the statute. (Laws of 1861, p. 384, Sec. 403.)

The argument, as I understand, goes to the extent that a *certiorari* is absolutely inhibited to a party aggrieved in all proceedings or actions wherein a right of appeal is given. If this be a sound construction of the statute, the judgment of the probate court in this case should be reversed. I do not, however, so understand the law. Such a construction would often defeat the ends of justice.

The statute is remedial; designed to confine inferior tribunals and officers within the prescribed limits of their powers, and to correct, in a speedy and economical manner, any abuse of them that may prejudice others. It should receive such a fair and reasonable interpretation as will best secure these objects.

Opinion of the Court—Brosnan, J.

The writ of *certiorari* is declared to be “proper in all cases where an inferior tribunal exercising judicial functions has exceeded its jurisdiction, and there is no appeal or other plain, speedy and adequate remedy.” Like the other remedy referred to in the statute, the appeal also must be adequate to the relief sought. Such a construction does no violence to the language or spirit of this section.

An appeal through the means of which errors, though manifest, cannot be corrected, would be a useless ceremony. [*96] The law does not require vain things to be done; it does not limit a suitor to a process that is fruitless when it furnishes one that may prove available. But in this case an appeal to the probate court would not only be ineffectual, but would not lie, in my opinion.

The judgment of the justice was in effect a judgment by default. Such judgment is not appealable. (20 John. 283; 17 Id. 469; 8 Wend. 219.)

A court of appellate jurisdiction cannot reverse a judgment produced by the voluntary act of a party. (18 Wend. 169; 5 Denio, 385.) The probate court can only try the issues that have been tried in the court below. (10 Cal. 19; 11 Cal. 328; 6 Cal. 666.)

In this cause there was no answer, no issue, either of law or fact—of course there could be no trial in the probate court. The statute says that, upon an appeal, the case shall be tried *de novo* in the appellate court. That is, as we understand it, in the same manner, with the same effect, and upon the same issues tried in the court below.

The court says in 10 Cal. 19: “The issue must be made in the court of original jurisdiction. The county court can only retry the issue tried in the court below.” To the same effect is the case of *Adams v. Oakes* (20 Johns. 282, *supra*).

The case before the court is much stronger than any of those cited.

If, as contended for by the appellants' counsel, the confession by Foster is a confession of Armstrong himself, and therefore good, most clearly Armstrong is thereby concluded. I am therefore satisfied that, upon principle and

Opinion of the Court—Brosnan, J.

well as authority, the writ of *certiorari* was appropriate and legally issued. It remains, then, to be ascertained whether the judgment of the justice is valid.

Counsel remind us that the examination of this question "shall not be extended further than to determine whether the inferior tribunal has regularly pursued its authority," or (let me add) has had any authority.

It is said that this is a proceeding under section 651 of the Practice Act (Laws of 1861, p. 424), not partaking of the quasi-criminal *character of the pre- [*97] ceding sections of the statute, and consequently should not be construed as rigorously as a case wherein force constitutes the gravamen of the action. I agree with counsel as to the statement of fact, but not in his conclusion.

In a similar case in New York, on *certiorari*, the court say: "This being a summary proceeding in derogation of the common law, the statute should be strictly pursued; and that must appear affirmatively on the return. Summary proceedings are in general open to objections for technical omissions, imperfections or defects in the return, and proceedings under the landlord and tenant act are not an exception. (*Farrington v. Morgan*, 20 Wend. 208, 209.) Where a statute prescribes the mode of acquiring jurisdiction, that mode must be complied with or the proceedings will be a nullity.

In every form in which the question has arisen, it has been held that a statute authority by which a man may be deprived of his property or estate must be strictly pursued. Again, it is said that the justice had jurisdiction of the subject by law, and that by the terms of the lease, and the confession, he acquired jurisdiction of the person of the defendant; and that, in such case, intendants may be indulged to support the judgment of a court of limited as of a court of general jurisdiction. It is true that in actions of this nature a justice has jurisdiction of the subject, yet only in a qualified sense. He has power to try, hear and determine cases arising under the statute; but that power is conditional. It flows from the provisions of the statute that confers it, upon the existence of conditions precedent. For

Opinion of the Court—BROOKS, J.

example: the conventional relation of landlord and tenant must exist as here—so the tenant must be holding over after the expiration of the term, or contrary to the covenant of the lease, etc. In all such cases the lessor may proceed to dispossess the lessee; but he must take the steps pointed out by the law. In the case before the court it is alleged that the tenant has failed to observe or perform a covenant in the lease, to wit, by failing to pay a month's rent in gold or silver. This is the only ground of complaint. Admitting a breach of covenant, the right to sue does not arise *eo i*

stanti upon the breach. The covenant is for the [§98] benefit of the lessor, and he may waive it. If

he does not, what does the law first require to be done? A demand in writing must be made upon the tenant that he deliver possession of the premises. If after such demand he refuse to render the possession for three days, then, *in* *before*, the justice shall proceed in the same manner as in cases of forcible entry. This demand is indispensable; it is as necessary to be made before suit as it is that the relation of landlord and tenant should exist. If omitted, the cause of action is not yet ripe, and the magistrate is not completely clothed with authority "to hear, try and determine it." In other words, the subject-matter is not yet *in* *case* upon which the power of the justice can act or be exercised. Being thus essential, it should affirmatively appear on the face of the return that it was seasonably made. But it does not anywhere so appear; and indeed could not, for the reason that the demand was never made, as appellant counsel admits. I think no legal process can issue before this is done. Acts that are requisite to give a court of justice jurisdiction are distinguishable from the acts of such court or justice after jurisdiction *has been* already acquired.

The authorities say that when facts are required to be proved to warrant the issuing of process in a court of special and limited jurisdiction (which a justice's court is—8 C 340; 12 Id. 285; 15 Id. 301), if there be a defect of process to an essential point, the process will be void. (*Miller v. Brinkerhoff*, 4 Denio, 118.)

Again, no summons was served or issued. The defense

Opinion of the Court—Brosnan, J.

ant had no day in court. But the argument in answer to all this is, that the defendant waived the demand and also the summons, by the terms of the lease, and that the confession of judgment by Foster cured all defects, jurisdictional and otherwise.

The language of the lease, in its common acceptation, is broad enough to warrant this statement. Indeed, it will warrant an entry of judgment before there is any infraction of the agreement. But the argument proves too much if it proves anything, because it leads to the romantic conclusion that Paul and Bateman might, at any time, without even a complaint, whether any covenant was or was not broken, dispossess their *tenant. All that is [*99] necessary is, that the attorney "nominated in the bond" confess judgment, and the work is accomplished.

Armstrong first learns his fate when the officer of the law appears and turns him out. The law is not chargeable with such an absurdity. But the learned counsel of the appellants saw the dilemma of the argument, and to escape it admitted, in answer to a question from the bench, that it was necessary to file a complaint. If so, I think it would be equally necessary, certainly commendable, to give notice of some kind to the defendant. But it is difficult to see the necessity of a complaint, if, as contended for, the confession and judgment were authorized. A judgment upon confession authorized by law, and entered pursuant to its forms, in a proper court, imparts jurisdiction of the subject-matter and person, and concludes a party forever. This would be its legal effect. Hence we may discard in this case all questions touching waiver of demand, summons and notice, about which much has been said. However, to recur to the admission of the learned counsel, if a complaint must have been filed, it must necessarily be a good one, and to be such must contain allegations of every fact requisite to establish a right to immediate possession. The justice must have judicial knowledge by proof of them before he can act as has been before stated, in arguing the necessity of averring a written demand of possession. But aside from what has been thus far advanced, there still remains a grave question to be answered.

Opinion of the Court—Brosnan, J.

Is a judgment on confession in a justice's court authorized by law in actions brought under the forcible entry and unlawful detainer act?

So far as I recollect, and as my research has extended (and I have examined as far as the present limited means allow), I have been unable to find this precise point determined. In the absence, therefore, of any adjudication on the question, I can only resort to general principles, analogous cases, and to the statutes.

It is an acknowledged rule that courts of justices of the peace are of special and limited jurisdiction. They can take nothing by intendment or implication. They are [§100] creatures of the statute, and as they proceed they must move step by step with its requirements, their acts will be void. In the statute under which the proceeding was instituted there is no provision made for entering judgment on confession; but there is another specific mode for rendering judgment therein prescribed. From this fact it would seem that the mode so pointed out should be pursued. However, by other provisions of law to which the attention of the court has been directed, found in another chapter of the statutes, justices of the peace are authorized to enter judgment on confession in certain cases. And hence it is claimed that the power must also exist in the justice as regards cases of the same character as the one now before the court. This conclusion or inference does not necessarily or legitimately follow. In support of this view, counsel for appellants cite a case from California (9 Cal. 572). The case holds that the proper construction of the act is that cases under it must be governed by the provisions of the act itself, so far as they go, "and as to matters not embraced by the words of the act, that the general rules governing proceedings in other courts will apply." The reasonableness of this rule is sufficiently satisfactory, but I apprehend the rule does not bear out the argument, for the reason that the words of the act of themselves are sufficient for the case under consideration, and there is no necessity to resort to the rules or practice of other courts.

Again, if the provisions of law authorizing judgments in

Opinion of the Court—Brosnan, J.

confession be invoked, it would seem necessary to follow the forms they prescribe. This confession ignores all forms. But what I consider conclusive upon this point is, that in the statute enumerating the subjects of which justice's courts shall have jurisdiction, the only authority given to the justices to enter judgment on confession is in the following words:

"Eighth. To take and enter judgment on the confession of a defendant when the amount confessed does not exceed one hundred dollars." (Laws of 1861, p. 419, sec. 610, subd. 8.)

This evidently confines the jurisdiction to cases of money demands; else why omit all the other cases enumerated in the section, among which is classed and specified the action of forcible entry and unlawful detainer? "*Expressio unius est exclusio alterius*," is a well-settled and recognized rule of statutory interpretation; it applies here. [*101]

This being the law, even the consent of Armstrong could not confer jurisdiction. Where a statute does not give jurisdiction, consent of parties cannot give it. The case of *Beach v. Nixon* (5 Seld. 35, in the court of appeals in New York), bears a strong resemblance to this case. Like this, that was a case of landlord and tenant, and removed by *certiorari*. The lease, after stating the conditions, had this clause:

"Lastly, it is expressly agreed between the parties aforesaid, that in case of the non-fulfillment or violation of any or either of the above conditions, the said hiring and the relation of landlord and tenant shall wholly cease and determine; and it is agreed that the said party of the first part, or his agent, shall be entitled to and recover immediate possession of said premises under the statute, for holding over after the expiration of the term without any notice other than the usual summons."

The tenant was removed under a warrant issued under the statute. The court say to this:

"The point is, whether the covenant contained at the end of the lease either confers jurisdiction to proceed under the

Opinion of the Court—Brosnan, J.

statutes in respect to summary proceedings, or precludes the lessee from objecting for the want of jurisdiction. The law, and not the consent of parties, confers jurisdiction and that rule could have no practical force, if consent given in whatever form, could preclude inquiry as to the lawfulness of the jurisdiction."

In New York an affidavit is used as a complaint with *ius*. If the facts be denied by a counter affidavit of defendant, the points at issue shall be tried by a jury, and if the landlord succeeds, a warrant issues to remove the tenant. (2 R. S. 514, Sec. 34.)

In *Benjamin v. Benjamin* (1 Seld. 385), a case under the act, the court say:

"This statutory remedy, by way of a summary proceeding, is in derogation of the common-law remedy by action, and must be strictly pursued. A peculiar and limited jurisdiction is thereby conferred on certain magistrates, [*102] which can be *exercised only in the way prescribed.

They have no jurisdiction to try the cause, except by the mode pointed out. The law has made no provision for dispensing with a jury in such cases, *even by express waiver or consent.*"

Under the general law in New York, as here, parties may dispense with juries, but cannot do so in special proceedings unless the right is expressly given by the particular statute under which the proceedings are conducted. In a special case where the statute provided a trial by a jury of six persons, the parties consented to a trial by three, it was held to be error and the proceedings void. (1 Hill, 343.)

In a case where the justice had a written authority from a defendant to enter judgment against him, and the justice did so, the authority was held insufficient and the judgment reversed, because the party had not appeared in person before the justice. (6 J. R. 216.)

In *Tenny v. Filer* (8 Wend. 569), the defendant authorized the justice to enter judgment against him, but did not appear before the justice. Judgment was entered, but it was reversed. The court say:

"The appearance and confession of the defendant was

not an appearance and confession within the meaning of the statute."

These were cases where the law expressly authorized judgment by confession, but required an appearance in person. To the same point, 15 J. R. 244, 476; 4 J. R. 243.

In this view of the case, Foster's asserted authority disappears. But if his authority were competent, it would not help the case, for the reason that he exceeded its scope. It was special, particularly so under the circumstances surrounding this case, and everything done under it must be considered as *strictissimi juris*. He was bound to follow it to the letter. A deviation from its terms rendered his acts void. This is elementary doctrine, and does not require the citation of authorities. The power is to "enter the appearance and to confess judgment in behalf of the parties of the first part *therefor*."

It is not exactly stated for what he may confess judgment. Admit it means for the possession (and this is a liberal *construction), he could not go beyond that. [*103] Yet he undertakes to waive not only summons and notice, but also *time*. Armstrong did not waive, or agree to waive time, nor expressly authorize Foster to do so. Admitting he would and could waive summons and notice, it is not clear he would consent to waive time. At any rate, he did not. It cannot be said that time was of no importance. It was of the greatest moment to Armstrong. The law gave him three days before summons, and ten days after. As appears, he did not get an hour. In giving his assent to the entry of judgment, it accords with reason and justice that he intended it to be entered when, by law, it could have been if the legal course were pursued. Those ten days, which the law in its indulgence allowed him, he never waived. But Foster, perhaps understanding its importance, gratuitously waived this legal privilege for the defendant. Not alone that, but he consents to a judgment according to the prayer of the complaint *and costs of suit*. There was no express authority to confess judgment for costs. I cannot see why Foster may not with equal right and propriety confess judgment for damages, and yet his having done so could

Opinion of the Court—Brosnan, J.

not fail to shock the moral sense of every upright man. The record does not even show, by any legal proof, that the J. C. Foster who confessed the judgment was a member of the law firm of Robinson & Foster. This should affirmatively appear. The justice could not take judicial notice of the fact.

Other points have been made and discussed, but it becomes unnecessary to review them, as the questions already passed upon dispose of the case. The opinion of the court is, that the justice had not acquired jurisdiction; that the judgment rendered by him, and all proceedings subsequent, were without sanction of law, and therefore void. It is, however, insisted on, that the probate court has no authority to issue a writ of re-restitution, because the statute is silent on the subject, and hence that the order for the writ is erroneous. This point is not tenable. The probate court has jurisdiction to try and determine questions arising on *certiorari*, "and to issue all writs necessary and proper to the complete exercise of the powers conferred upon it by this and other statutes" (Laws of 1861, p. 418, Sec. [*104] 608), "and may thereupon give judgment, *either affirming, or annulling, or modifying the proceedings below." (Laws of 1861, p. 385, Sec. 410; *vide also* to this point, 3 Pick. 31; 10 Johns. Rep. 304-307.)

This power would seem to attach upon principle, as the power to annul would be barren and inefficient, unless the defendant could be restored to that of which he had been illegally deprived. But the very point has been judicially set at rest in our sister State. In the case of *Kennedy v. Hamer* (19 Cal. 374, 386), it appears the county court, after setting aside the judgment of the justice, ordered a writ of re-restitution, and the supreme court sustained the action of the court below. The question seems too plain for argument. The right results from the principle that a power to decide litigated questions is accompanied by the power to make the decision effectual.

Finally the earnestness and ability with which this cause has been argued by counsel of acknowledged candor and learning, have enlisted the utmost care in its examination.

Points decided.

The result of which is, that the judgment of the probate court should be, in our opinion, in all things affirmed.

Judgment affirmed.

By LEWIS, C. J., concurring:

I concur in the affirmance of the judgment below, but for reasons different from those given by Justice BROSNAN.

BEATTY, J., having been counsel for the appellants, did not participate in the hearing.

**HALE & NORCROSS GOLD AND SILVER MINING
COMPANY, APPELLANT, v. STOREY COUNTY ET AL.,
RESPONDENTS.**

[1 NEVADA, 104.]

COMMON LAW.—The common law adapts itself to the circumstances and necessities of the community where it is introduced.

¹ TAXATION OF POSSESSORY RIGHTS TO MINING CLAIMS.—Possessory rights to mining claims are property, and as such, taxable.

IDEM.—Taxation of the possessory right is not in violation of the section of the organic act which prohibits the territorial legislature from taxing the property of the United States. "The object of the [*105] section was to protect the government, and not to prevent the taxation of settlers on public lands.

² "MINING GROUND" — TECHNICAL MEANING OF THE WORDS. — The words "mining ground," when used in a deed, have a technical meaning. They refer to that interest which a mere occupant of the mine has in the same. They are not the words used when a fee simple or leasehold interest in real estate is to be conveyed.

APPEAL from the District Court of the First Judicial District of the State of Nevada, Storey County, Hon. CALEB BURBANK presiding.

The facts are stated in the opinion of the court.

Baldwin & Hillyer, for Appellants.

Dighton Corson, for Respondent.

By the Court, BEATTY, J.:

This was a complaint in equity filed by the plaintiff for the purpose of restraining the officers of Storey county from the collection of certain taxes which are alleged to be illegally assessed.

The defendants demur on the ground that the complaint does not state facts sufficient to constitute a cause of action.

But there is a stipulation in the transcript that the sole question to be raised or determined in the case is the "legality of the tax imposed under the revenue laws of the Territory of Nevada."

With this stipulation on the record, we will not inquire into the propriety or legality of the remedy sought in this case, but will confine ourselves to the question of the legality of this tax, and the manner of its levy.

With regard to the legality of the tax, two main [*106] questions are presented. The first and most important one is, can the possessory rights of mining to mining ground belonging to the United States be taxed?

The objections to the taxation of the mines are, that the title of the real estate is in the government; that the legislative assembly was by express enactment (see sec. 6 of organic act) prohibited from imposing taxes on property of the United States; and that the interest of the miner is not such property as is, in its nature, taxable; that it is too intangible and unsubstantial to be the subject of taxation. It has been said that the miner is a naked trespasser, without claim of title, a licensee or else a strict tenant at will, not entitled to notice to quit, and therefore having no valuable estate. That having no estate which is under his own control, but being, as it were, a mere occupant by sufferance on the government property, he has no property therein, and therefore his interest cannot be taxed as such.

By the strict rules of the common law, as it formerly existed, an action of ejectment could not be maintained upon the demise of a mere tenant at will, a licensee or a trespasser on the king's government land. But the common law is a law of reason and common sense. It adapts itself to the

Opinion of the Court—Beatty, J.

circumstances and necessities of the community where it is introduced. Here the policy of our government has been peculiar; owning vast bodies of mineral lands, it has encouraged the working of those mines by its citizens, but has steadily refused to make a grant of any kind of estate to the miner. Individuals have made large investments in mines and improvements, whilst the entire estate in the lands remains in the government. The government could not, like an ordinary proprietor, protect its licensees by the institution of suits against trespassers. From the necessity of the case, these licensees (we think they come nearer licensees than tenants) must have legal protection.

The courts and the laws adapting themselves to the necessity of the case, and governed by rules of common sense, reason and necessity, have universally treated the possessory rights of the miner as an estate in fee. Actions for possession, similar to the action of ejectment, actions of trespass, bills for partition, etc., are constantly maintained.

*Such interests are held to descend to the heir, [*107] to be subject to sale and execution, and to be assets in the hands of executors and administrators for the payment of debts. This general proposition will hardly be disputed, that a territorial legislature may tax any species of property, whether real, personal, or mixed, corporeal or incorporeal, so far as they are not restrained by the organic act. It appears strange to us that that which is so far property as to be subject of litigation in an action wherein the judgment, if for plaintiff, is for restitution of possession, is so intangible when you come to enforce collection of revenue, that it cannot be reached by process of law.

We are referred to the language of the learned justice who wrote the opinion in the case of *The People v. Morrison* (22 Cal. 78), as an authority for the proposition that congress intended to exempt possessory claims from taxation in order to encourage the settlement of the public lands, to bring them into market, to expedite the sale thereof, and thereby afford revenue to the government. Such a law (we mean one exempting all settlement rights from taxation)

Opinion of the Court—Beatty, J.

might encourage the *settlement* of public lands, but we are not so sure that it would facilitate their sale. If, prior to sale and payment for them, the settler is free from taxation and liable to taxation thereafter, he would, unless very patriotic, endeavor to delay the sale of the land he was occupying and avoid the payment as long as possible to save taxes. The government did at one time attempt to protect the settlers on public land from taxation, by providing that no State should levy taxes on land sold by the government for a period of five years after sale. But that policy was abandoned many years since.

We think of late years the government has only attempted to protect itself, and left the states and territorial governments to regulate the subject of taxes among their own citizens according to their own views of justice and propriety.

The next point to be considered is, does the description given by the assessor conform to the requirements of the statute, and more especially does the description distinguish between the possessory right, which is liable to taxation, and the ultimate right to the land, which is in the government?

[*108] *The assessment is in this form:

“Hale and Norcross Mining Company: 400 feet mining ground, situated,” etc.

Here follows description, by metes and bounds. The comes:

Value of real estate.....	\$150,000
Value of improvements.....	25,000
Value of personal property.....	2,400
Total.....	\$177,400

Here is a description of the property which we believe not claimed to be seriously defective, except that it does not point out whether the real title to the land, or the possessory title *only*, has been assessed.

The statute defines what real estate means, and where the value of one hundred and fifty thousand dollars is attached to the property, we have only to look into the statutes 1864, p. 38, Sec. 3, to see that real estate means only “the

Opinion of the Court—Beatty, J.

ownership or claim to, or possession of, or right of possession to any lands or mines in the territory." As the property is described as mining ground, then the real estate taxed at one hundred and fifty thousand dollars, was "ownership or claim to, possession of, or right of possession" to the mine described.

The next line as clearly points out the improvements which are situated on this same piece of mining ground, and shows the assessor intended to assess these improvements to the plaintiffs, who owned or claimed the mine.

But does this assessment show that the possessory title only is assessed? It appears to us it does. In the first place, we think the court must take judicial notice of the facts which are known to all intelligent persons, and are a part of the history of the territory—that the government originally owned all the land in the territory, and has never parted with the title to any which is known to be mineral land. Therefore, the legal presumption arises that a mine in the Territory (now State) of Nevada, belongs to the government, and the occupants have only a possessory title. Therefore, an assessment to an individual or company of so many feet of mining ground, clearly conveys the idea of a possessory right. The language does not convey to any one having a knowledge of the history *of the country the [*109] idea of an ultimate right to the land on which, or in which the mine is located.

Indeed, the most apt and fit words seem to have been used by the assessor to convey clearly his meaning. In all ordinary conveyancing, the word "land" is used to designate a certain portion of the earth's body which is the subject of sale. And if one here were the owner of a body of land containing a mine, or ledge of silver-bearing ore, in selling it, any conveyancer of common intelligence would use the word *land* when describing the thing granted. But were all conveyancers use the word *ground* when making deeds for possessory claims. "Possessory claim" to the land or ground is hardly ever introduced into mining deeds. So many "feet of mining ground," is the term almost always used.

Opinion of the Court—Lewis, C. J.

This phrase is familiar to everybody; we know, the moment we read the phrase, that it means the right of the occupant on the public lands. When the assessor avoided the term "*land*," and used the term "*ground*," which has become a technical word in Nevada deeds, he used the word he should have used in describing the interest to be taxed. We are told, however, this view of the case is in conflict with the decision in 22 Cal., to which we have before referred. There the term "*land*" is used, and in that State a large amount of land is owned by private individuals interspersed among the public lands in every part of the State. The term there used would indicate that the value of the land, free of incumbrance, was assessed. Clearly, the settler was not bound for such an amount. The utmost value of his interest was the worth of the land, less what he would have to pay the government for the title thereto.

The judgment of the court below is affirmed.

THE PEOPLE, APPELLANTS, v. T. J. TAYLOR,
RESPONDENT.

[1 NEVADA, 109.]

TAXATION OF MINING RIGHTS TO MINING CLAIMS.—*Held*, that possessory rights to mining claims are property subject to taxation upon the authority of *Hale & Norcross Company v. The County of Storey* (1 Nev. 104).

APPEAL from the District Court of the First Judicial District of the State of Nevada, Storey County, Hon. R. M. MERRICK presiding.

[*110] *By A. Nourse and D. Carson, for Appellants.

Remond & Reynolds for Respondent.

By the Court, LEWIS, C. J.:

The questions presented by the record in this case are the same as those raised in the case of the *Hale & Norcross Co. v. The County of Storey*. Upon the argument presented for the defendant it was agreed that the complaint is

Opinion of the Court—Lewis, C. J.

biguous, unintelligible and uncertain; but this point is not taken by the demurrer, and therefore was improperly before us. I have no hesitation, however, in saying that with the exception of a few verbal inaccuracies, the complaint is perfectly good. For the reason given in the opinion in the case of the *Hale & Norcross Co. v. The People of Storey*, the judgment of the court below in this case must be reversed.

THE PEOPLE, APPELLANT, v. ROBERT LOGAN,
RESPONDENT.

[1 NEVADA, 110.]

¹APPEAL ALLOWED FROM AN ORDER SUSTAINING A DEMURRER.—An appeal in criminal cases may be taken from an order of the district court allowing a demurrer, though final judgment be not entered.

²INDICTMENT—STATUTORY OFFENSES, HOW STATED.—An indictment should charge a statutory offense in the words of the statute creating it, or in words of similar import.

³IDEM.—The crime must be directly and positively charged and not argumentatively. The want of a direct allegation of anything material to the description of the substance, nature or manner of the offense cannot be supplied by any intendment or implication whatever.

APPEAL from the District Court of the Second Judicial District of the Territory of Nevada, Ormsby County, Hon. GEORGE TURNER presiding.

Thomas E. Haydon and Charles E. Flandreau, for Appellant.

**R. M. Clarke*, for Respondent.

[*112]

By the Court, LEWIS, C. J.:

The defendant was indicted by the grand jury of Ormsby county, under section eighty-five of the revenue act of 1862,

The indictment sets forth that the defendant, on the 3d day of September, A. D. 1862, was elected tax collector of the county of Ormsby, and that on the 12th day of the same month he duly qualified and entered upon the duties of his

Opinion of the Court—Lewis, C. J.

office; that prior to the first Monday of May, A. D. 1864 there had been issued to the defendant, as tax collector, by the auditor of the county of Ormsby, a license, authorizing the licensee to retail spirituous, malt and fermented liquor

the same being a fifteen dollar license; that on the [113] 19th day of June, A. D. 1864, at said county

Ormsby, the defendant, instead of returning to the auditor the said license on the first Monday of May, A. D. 1864, as required by law, willfully, unlawfully and feloniously retained, and had in his possession, the same license with intent to put the same in circulation. It is also charged that on the 19th day of June, A. D. 1864, in the county of Ormsby aforesaid, the defendant did willfully unlawfully and feloniously issue the said license; that on the 19th day of June, A. D. 1864, in the county of Ormsby the defendant unlawfully, willfully and feloniously altered the license aforesaid, from a fifteen dollar to a forty-five dollar license, and willfully, unlawfully and feloniously issued the same to certain parties mentioned.

To this indictment defendant interposes a demurrer, as signing several grounds, only two of which need be noticed.

First. That the indictment does not state facts sufficient to constitute a public offense; and

Second. That it does not substantially conform to section two hundred and thirty-four and two hundred and thirty-five of the criminal practice act of the State of Nevada.

This demurrer was sustained by the court below, and an order made resubmitting the case to the next grand jury of the county. From the ruling of the court, sustaining the demurrer, the people appeal.

A preliminary motion was made by defendant's counsel to dismiss the appeal, upon the ground that the final judgment not having been entered no appeal could be taken; that no appeal will lie from an order sustaining a demurrer to an indictment, and some authorities from California are relied on to sustain this position.

But these decisions were based upon a statute essentially different from ours; and I do not think it necessary to look beyond the practice act itself to determine this question.

Opinion of the Court—Lewis, C. J.

Indeed, section four hundred and sixty nine seems to cover this case exactly. It provides "that the party aggrieved in a criminal action, whether that party be the people or the defendant, may appeal as follows: First, to the probate court of the county from a final judgment of a justice's court; second, to the supreme court from a final judgment of the district court, in all criminal *cases; [*114] also from an order of the district court allowing a demurrer, granting or refusing a new trial."

There can be no diversity of opinion as to the interpretation to be put upon this language. The last clause of the section allows an appeal from "an order of the district court allowing a demurrer." But it is claimed by defendant's counsel that as it is the duty of the court under section 289 of the criminal practice act, to "give judgment either allowing or disallowing" the demurrer, it could not have been intended to allow an appeal where no judgment is so given upon sustaining the demurrer.

I can see no reason for putting so restricted an interpretation upon these general words of the statute; the reason is all against it. If the appeal is to be confined to cases where final judgment is rendered, the latter portion of subdivision second of section 469 is utterly nugatory and of no force or effect; because an appeal from a final judgment is expressly provided for by the first portion of the section. Indeed, such an interpretation can only be adopted by disregarding the cardinal rule, that in the construction of a statute effect is to be given, if possible, to every clause and section of it. If any effect is to be given to the words, "also from an order of the district court allowing a demurrer," we must hold that an appeal will lie from an order sustaining the demurrer, regardless of whether judgment is entered or not.

Again, there is a complete answer to the position taken by defendant's counsel in the language of the section itself, which allows an appeal from an *order*; and an *order* can in no sense be considered a judgment. It would be difficult to find words which would more clearly express the intention of the legislature than those employed in section 469. The first clause of subdivision second authorizes appeals

Opinion of the Court—Lewis, C. J.

from final judgments, and the second clause provides for an appeal from an order allowing a demurrer, which is precisely the case at bar. I think, therefore, that this appeal was properly taken.

This brings us to the consideration of the sufficiency of the indictment upon which the defendant was arraigned.

We recognize the fact that the tendency of all modern legislation and judicial decisions is to ignore the [*115] correctness of form *which was required at common law, but it is a tendency perhaps more to be deplored than encouraged. By this attempt to ignore the formulæ of the common law, our entire system of pleading has gradually passed from the extreme of technical exactness into the opposite, of loose, careless and slovenly inaccuracy, which is more fruitful in perplexing and annoying the courts than in furthering the ends of justice.

The express provisions of our practice act, of course, cannot be disregarded, but courts should not go beyond its strict letter to encourage carelessness in pleading.

The indictment in this case I think radically defective. That section of the revenue act under which it was found provides that, "if either the treasurer, county auditor, tax collector, or any person, shall have in his possession, with intent to circulate, or put in circulation, any other license than those properly issued to the tax collector, under the provisions of this act, the person so offending shall be guilty of felony, and on conviction be sentenced," etc.

The words of the statute creating the offense, or words of similar import, should be used in the indictment. In this case the having in possession with intent to circulate, or putting in circulation any license other than those properly issued, is what constitutes the offense; but nowhere in this indictment are these words, or words of a similar import, used; but, on the contrary, it is expressly charged that on the 19th day of June, A. D. 1864, the defendant did "willfully, unlawfully and feloniously issue" a license which had been *properly* issued on the part of the plaintiff to him. This surely is no crime, but the strict performance of his duty. *But it is urged* on behalf of the people, that as the defend-

Opinion of the Court—Lewis, C. J.

ant did not return the license in question to the auditor on the first Monday in May, as required by law, therefore it must be taken to be a license other than one properly issued. In other words, that the failure to return a license properly issued at the time required by law, *ipso facto*, makes it a license improperly issued. I do not think this position tenable. How the mere neglect to return a license once regular and properly issued, will change it so as to make it a license other than one properly issued, I am unable to see.

There is a further answer to this position of counsel, however, *which is conclusive, even if it be admitted that such a license was one improperly issued: that is, it is not directly charged in the indictment to be such. The facts are stated that the defendant issued to Fulston & Bro. a license which, by law, he should have returned to the auditor a month prior thereto; *arguendo* we might say, that it was therefore a license improperly issued; but this is argumentative, and not good even in civil pleading, much less so in an indictment. (Com. Dig., Pleading.)

When the defendant was sued for taking away the goods of the plaintiff, he pleaded that the plaintiff never had any goods; this was an infallible argument, but it was held not to be a good plea. The charge in an indictment should always be positively laid, and not inferentially. Archbold says: "The want of a direct allegation of anything material in the description of the substance, nature or manner of the offense, cannot be supplied by any intendment or implication whatever." (Archb. Crim. Pr. and Pl. 87.) So strictly observed is this rule, that "in an indictment for murder the omission of the words *ex malitia premeditata* is not supplied by the words *felonice murdravit*, although the latter words imply them." (Id.)

Again, counsel contend that the indictment charges the defendant with having changed the license from a fifteen to a forty-five dollar license before issuing it, and that therefore the conclusion is irresistible that it was a license other than one properly issued. True, the argument is infallible; but the point is subject to the same objection as the other; *it is argumentative.*

Opinion of the Court—Beatty, J.

Numerous other objections are urged to the indictment but we do not think it necessary to pass upon them. The ruling of the court below is sustained.

J. C. TRAVIS, RESPONDENT, v. M. EPSTEIN ET AL
APPELLANTS.

[1 NEVADA, 116.]

¹ PAROL EVIDENCE WHEN ADMISSIBLE TO CORRECT MISTAKES IN WRITTEN INSTRUMENT.—Parol evidence cannot be admitted to supply, contravary or enlarge the words of a written contract, except in a proceeding to correct a mistake in the drafting of the instrument. [*117] *IDEM.—But parol evidence may be admissible to prove the existence of a separate and distinct parol contract at the same time as the written contract is made.

MONEY PAID UNDER MISTAKE OF FACT MAY BE RECOVERED BACK.—If a payment in fact is made in a settlement, and the party against whom it is made pays more than he is justly bound to pay, he may recover it back. CONSIDERATION—PARTIAL FAILURE OF, A GOOD DEFENSE.—A partial failure of consideration can be pleaded as a defense *pro tanto* to a note.

EVIDENCE ADMISSIBLE TO SHOW MISTAKE.—The agreement between the parties and the circumstances attending the settlement may be introduced to show other facts and circumstances, to show mistake.

APPEAL from the District Court of the Second Judicial District of the Territory of Nevada, Douglas County, GEORGE TURNER presiding.

The facts of the case are stated in the opinion.

Williams & Bixler, for Appellants.

Kendall, Quint & Hardy, for Respondent.

[*119] *By the Court, BEATTY, J.:

This was a suit brought on two promissory notes by the plaintiff as assignee of one Dryden. The defense set up (so far as there is any question before the court) was, that prior to the time the notes were executed there had been an informal settlement between the defendants and Dryden, and a balance found due to Dryden of nine hundred

(1) See 3 Nev. 120; 4 Nev. 224; 7 Nev. 200.

Opinion of the Court—Beatty, J.

eighty-three dollars, but this settlement was made in the absence of defendant's books, and with an understanding that if any error was discovered when they had access to their books, it was to be rectified. On the 7th day of January, 1862, defendants executed four promissory notes of different sizes, amounting in the aggregate to nine hundred and eighty-three dollars, with, as the defense alleges, the "express understanding, promise and stipulation, if any error or mistake should be discovered thereafter that the same should be rectified, and that said promissory notes should be enlarged or diminished in amount, according as the mistake, if any should be found, in favor of or against said Dryden."

On the trial of the case, after the plaintiff rested, the defense offered the following testimony: "That at the time said notes sued upon were given by said appellants, to the assignor of respondent, it was the express understanding and stipulation between the said assignor (Dryden) of the respondent [and these appellants], that, if at any future period, upon examination of their books, accounts, vouchers, etc., the appellants should discover any mistake or error in the amount of their respective claims against each other, increasing or diminishing the amount informally settled upon, and for which the notes referred to herein were given, then the said error, upon its being discovered, should be rectified, and the amount of said notes should be increased or diminished in accordance therewith." Also, appellants offered to prove, that after the execution of said *notes, they did make an examination of [*120] their books and vouchers, according to said stipulation, and found that the said Dryden, the payee of said notes, had claimed more than was due him, and that there was an error or mistake against the respondent of two hundred and twenty dollars existing at the time said notes were given, and which should have been deducted from said notes according to agreement; and appellants further offered to prove that when they executed and delivered these notes to the said Dryden, payee, as aforesaid, that neither these appellants nor the said Dryden had present

Opinion of the Court—Beatty, J.

their respective books, accounts or vouchers, by which a correct settlement of their business affairs could be ascertained.

The admission of this testimony was objected to by plaintiff, the objection sustained, and the defendants excepted. The question presented to this court is, did the court below err in rejecting this testimony? Respondents rely on the proposition that "parol evidence is not admissible to supply or contradict, to enlarge or vary the words of a contract in writing." No proposition can be better established than the one laid down. Yet the application of that rule in practice sometimes presents questions of great nicety. It is not contended here that the contract set up in the defendants' answer could be proved by way of explaining the meaning of the notes given; that is, "to supply, contradict, enlarge or vary the words" contained in these notes. Such proof can never be introduced except in a proper proceeding where there has been a *mistake* in drafting the instrument. But if we understand the position of the appellants, they claim the right to prove a substantive and distinct contract. The language of the pleading is rather peculiar, "that said promissory notes should be enlarged or diminished in amount according as the mistake, if any should be found," etc. We are hardly to suppose, if the parties used this exact language, that it was their intention that if Dryden found a mistake in the accounts in his favor that he was to alter or erase and rewrite the amounts in the notes he held against the defendants, to correspond with the corrected accounts; or if the error was proved the other way, that he was to allow the defendants to alter the notes he held. But if we put a common-sense interpretation on the agreement, it simply meant that if an error was found, it was to be corrected. If in favor of the defendants, Dryden would surrender one or more of the notes, or enter a credit on them to the extent that would be necessary to correct the error. If against the defendants they would execute an additional note for the amount due. Putting this interpretation on the agreement, and it

Opinion of the Court—Beatty, J.

to us that it may be held to be not an agreement to the contract as expressed in the notes executed, but a separate and independent agreement that, upon the happening of a certain event (the finding an error or mistake in settlement) they would correct it. We are not satisfied an agreement would be invalid.

would appear to be an agreement founded on a good consideration; nor do we see that the fact that the agreement was entered into simultaneously with the execution of the notes, renders it null and void, or affects the character of the defence by which it is to be sustained.

Not admitting our views on this point are erroneous, still it appears to us that the rights of the parties in this instance would be about the same without oral agreement.

In the absence of their books, the parties had made a statement, and the defendants paid an apparent balance against themselves, each of the parties acting in good faith, laboring under a mutual mistake of fact, there can be no doubt the defendants would, on discovering a mistake against themselves, have been entitled to recover back the amount paid beyond the real balance against them.

If they possessed this right without agreement, the contract which was attempted to be made could not destroy that right.

The defendants not only offered to prove the verbal contract, but the existence of the mistake. If the notes were for nine hundred and eighty-three dollars, and there was only due from defendants seven hundred and sixty dollars, there was a *partial* failure of consideration; if a *partial* failure of consideration can be set up as defence to a note, that part of the evidence relating to the mistake in the accounts was admissible, for the purpose of proving that failure.

It has not been many years since it was almost invariably held by the courts of England and the various States

of this *Union, that partial failure of the consideration [*122]

could not be pleaded at law as a defense *pro*

to a note.

In late years, however, to avoid circuity of action, many

Nov. Dec.—7

Opinion of the Court—Beatty, J.

common law courts have held that partial failure of consideration of a note may be pleaded at law. That we think a better rule; and especially must it be so under our system where the common law and equity systems are so intimately connected. The notes in this instance were assigned after maturity, and it is a well-settled principle, that under such circumstances, whatever would have been a defense to the notes in the hands of the original payee, is also a defense against the assignee.

The answer of defendants in this case seems to rest principally on that oral contract as a defense. Nevertheless it states substantially the facts that would have to be stated to sustain the plea of partial failure of consideration.

Under our very liberal system in regard to pleadings, we think it may be held as a good answer to support that defense.

The authorities as to the introduction of evidence to prove oral agreements made when the notes were executed, as to the manner of paying notes, the giving of credits, etc., as it appears to us, somewhat conflicting and not easily reconciled.

We think these propositions have been settled. If A. and B. settle accounts, A. gives his note to B., and B. agrees with A., on examination of his accounts, is dissatisfied, he may give up the note or enter a credit on it, this is not a verbal agreement. It is a verbal agreement to make that dependent on the *will* of A., which by the writing is absolute. If B. says to A., when the note is executed, if you will procure bank notes of a certain character, I will take them in discharge of this note, and A. executes the note with that understanding; it has been held he cannot discharge the note with such bank notes, or plead the tender of them as a defense, because this would be varying a written contract by parol.

Yet when B., by the terms of a contract, was bound to pay A. a sum of money at a future day, and A. obtained from B. a smaller sum, and executed his note to B. for such smaller sum, with the oral agreement made when the note was executed, that the note was not to be paid, but the note

Opinion of the Court—Beatty, J.

accumulated interest was to be credited on the larger sum when it became *due on B.'s contract, this [*123] agreement was held to be a defense against the note. A case which seems irreconcilable with the preceding cases.

The case of *Batterman v. Pierce* (3 Hill, 171), is, it appears to us, precisely like the one under consideration, so far as it relates to the admissibility of oral testimony.

In next to the last paragraph of opinion, page 178, the court holds the oral testimony does not tend to vary the written contract, but proves a distinct verbal contract entered into simultaneously with the written contract.

Several other cases we have examined seem to agree in principle with these latter ones. From the want of access to a good library, we have not been able to give this part of the subject such an examination as we could have desired. But from the best light we have on the subject, we are satisfied the whole of the evidence offered by the defendants should have been admitted. The settlement having been made, the burden of proof falls on defendants to prove a mistake. And that proof must be reasonably clear and satisfactory.

The fact that the parties, when they made the settlement, anticipated that probably there might be a mistake, may be legitimately introduced with other testimony to explain any mistake and partial failure of consideration. The proof of the agreement, and the fact that defendants *thought* there was a mistake, would not be a defense to this action. But proof that there was a mistake is a defense *pro tanto*.

The order of the court below, refusing to grant a new trial, must be set aside, the judgment reversed, and a new trial granted.

Opinion of the Court—Beatty, J.

RUNKLE, LICHTENSTEIN ET AL., APPELLANTS, v. GAYLORD, RESPONDENT.

[1 NEVADA, 123.]



RESPONSE TO PETITION FOR REHEARING.

DUTY OF MORTGAGEE WITH POWER TO SELL.—A mortgagee or trustee in possession, with power to sell, must sell fairly and for the best price he can obtain.

PURCHASER FROM MORTGAGEE—WHEN NOT AN INNOCENT VENDEE.—One who purchases from a mortgagee in possession, with power to sell, [*124] "and who knows the mortgagee is sacrificing the property, selling it at a small fraction of its value, and that, too, when he could collect his debt out of the rents in from two to five months without sale, is not an innocent vendee, and will not be protected in his purchase. He can occupy no better position than that of an assignee of the mortgage debt.

DEED TO THIRD PARTY—EFFECT OF.—If he gets a third party, who is ignorant of the fact that the vendee is merely a mortgagee or trustee, to make the purchase, advance the money for him and take the deed to himself (the third party), this will not alter the effect of the deed after the nominal purchaser transfers the title to his principal for whom he made the purchase.

IDEM.—The deed can only operate as a security for the advance made by the nominal purchaser. When that money and interest is paid by the beneficial purchaser, then he stands just as if he had made the purchase himself without the intervention of a third party.

APPEAL from the District Court of the First Judicial District of the Territory of Nevada, Hon. J. W. NORTH presiding.

The facts of the case are sufficiently shown in the opinion.

Anderson & Lansing and J. H. Hardy, for Appellants.

Ralston & Griffith, for Respondent.

[*125] *By the Court, BEATTY, J.:

This cause was heard and determined by the Supreme Court of the Territory of Nevada, and after its determination a petition for rehearing was presented to that court which was never acted on. It now comes before us to determine whether that petition shall be granted or refused. The opinion of the late court is not to be found among the

Opinion of the Court—Beatty, J.

bles of the court, and we are therefore under the necessity of treating this case almost as if it were before us on trial.

The principal facts of the case are these:

The plaintiff, Gaylord, in the month of June, 1860, was the owner of a certain town lot in Virginia, and being indebted to George W. Durgan in the sum of two hundred and forty dollars, executed his note to Durgan for that amount, and secured the note by mortgage on his city lot.

In April, 1861, plaintiff was in bad health, and fearing a sudden death, gave an absolute deed to Durgan for the lot—Durgan accepting the deed and promising to sell the lot and remit the proceeds (after deducting the amount of his note), to the family of Gaylord in Illinois. When the absolute deed was delivered, Durgan still retained the note and mortgage. Durgan, after this, left the Territory, and Gaylord continued to enjoy and receive the rents and profits of the property, but in so doing professed to act as the attorney of Durgan. In November, 1861, Durgan appointed one C. H. Fish his attorney, with power to collect debts and execute conveyances of real estate.

In January or February, 1862, Durgan instructed his attorney, Fish, "to raise the money on said property to pay said note of two hundred and forty dollars, and also two other notes of other parties, amounting to about five hundred dollars, in all to about seven hundred and fifty dollars." This quotation is from the finding of the referee. We are entirely unable, from the pleadings, from the findings of the referee, from the evidence, or statement of facts made by counsel, to see what connection these two notes for "about five hundred dollars" had with the business of Gaylord and Durgan. Sometimes we have been inclined to believe that these two notes were notes against Gaylord, which Durgan had bought and got assigned to himself, and was desirous of having tacked on to his mortgage. From other expressions, especially in petition for rehearing, we could infer that these were notes due from Durgan to Gaylord, and not to this record.

Fish was instructed to get a new note from Gaylord covering the whole seven hundred and fifty dollars, or in case of

Opinion of the Court—Beatty, J.

refusal to sell the lot for *that amount*. Gaylord refused to execute the new note (for what reason is nowhere stated) and Fish then attempted to raise the seven hundred and fifty dollars on the property. After trying in other quarters he applied to Lichtenstein, who was then a tenant in possession of the lot, paying one hundred and fifty dollars per month. Lichtenstein's lease purported to be made by Durgan, through his attorney-in-fact, Gaylord. Lichtenstein was informed by Fish that he had been instructed by Durgan "to raise the money on the plaintiff's note and the other notes as before stated, and to execute a deed of the property upon receiving the amount due on said notes. He showed his power of attorney and plaintiff's deed to Durgan. He also showed the notes to Lichtenstein, and figured up the amount due on them, and stated to him that he would execute a deed for the amount so found to be due on them."

This quotation is from a finding of the referee. Two weeks after this conversation between Fish and Lichtenstein, the latter came with Runkle to see Fish. Runkle advanced the seven hundred and fifty dollars, took the deed to himself, and gave an obligation to Lichtenstein to convey the lots to him on the payment of seven hundred and fifty dollars within six and after three months from the date thereof, he (L.), in the meantime, to keep the property and pay a rent of sixty dollars per month until the purchase price was paid. After the deed was delivered to Runkle Fish then offered him the three notes and the mortgage to Gaylord.

At first he appeared surprised at the offer, and was disposed to refuse having anything to do with them, and then accepted them. Subsequently Lichtenstein paid the seven hundred and fifty dollars to Runkle and took the deed.

Gaylord tendered to Runkle before he deeded the lot [*127] to Lichtenstein the *amount of the two hundred and forty dollars, note and interest, and demanded a deed for the property. This was refused, and a suit was brought. The referee finds that Lichtenstein had notice of the transaction between Durgan and Gaylord, and that Runkle was not the *real purchaser* of the lot, but only advanced the money for *Lichtenstein*, and took his security on the lot.

Opinion of the Court—Beatty, J.

The referee decrees that on the receipt of the two hundred and forty dollars and interest by Runkle, he should convey the lot to Gaylord. This decree is sustained by the court, and counsel for defendants ask for a rehearing. The first proposition in petition is in general terms (no particular defect pointed out), that the complaint is defective. The complaint is not a model of good pleading, but we think states facts sufficient to entitle the plaintiff to the relief sought, if sustained by the proof. The next point is that even according to plaintiff's theory, Durgan was trustee, with power to sell, and if he sold under the power his failure in regard to the application of the funds could not invalidate the sale.

This is true if the sale was a fair one, and the purchaser had no complicity with the misapplication of the funds.

Another point made by the petitioner is, that if Lichtenstein knew the facts in relation to Durgan's holding the notice and mortgage against Gaylord, there is no evidence that he knew there was a promise or trust on the part of Durgan to send the proceeds of the sale to Gaylord's family. That seems to be true; but it is a matter of no importance whether he knew anything about the trust or not. If Durgan merely held the deed as security for the note (and once a mortgage always a mortgage, is a maxim of the law), then he must act fairly toward Gaylord. He had no more right to commit a fraud on Gaylord than on his family. Whether there was or was not a trust in favor of Gaylord's family, was immaterial so far as Lichtenstein was concerned.

The fact that the plaintiff did not swear the trustee, cannot have much weight in this case when we consider—

First. That the trustee was out of the Territory; and

Second. That if any fraud was committed, he was the main agent in the fraud.

*The fact that Gaylord was asked to pay his debt [*128] before the sale was made, cannot deprive him of his property.

If, as the referee finds, Lichtenstein was the real purchaser, and Runkle only advanced the money for him and took security on the property, then Runkle's ignorance of

the circumstances under which Durgan took the deed from Gaylord could not protect Lichtenstein. Runkle might be protected to the extent of securing his money advanced but that is all. This money he had received from Lichtenstein; he could not claim it of Gaylord. Neither could Lichtenstein, unless he were an innocent purchaser. The fears of counsel that Runkle, an innocent party without notice, might, if this decree stands, be answerable over to Lichtenstein, are, we think, entirely without foundation. There was no incumbrance on this land, created by Runkle or any one claiming *under* him; but if there was an incumbrance, it was created by one who held the land *prior* to Runkle, and for such incumbrance Runkle is not liable under the forty-ninth section of the act concerning conveyance.

Having noticed the principal points made in the application for a rehearing, we will now give our views of the case in a more connected form.

The referee finds, and we think on sufficient evidence that Runkle was not the real purchaser, but merely the mortgagee, in effect, of Lichtenstein. That being the case and he having received his money of Lichtenstein before the trial and judgment, the case may be treated as if it were not in it. It is only necessary to investigate the right of Lichtenstein and Gaylord. When Lichtenstein was negotiating with Fish for the lots, he knew Fish only wanted to raise the amount of those notes. Whether he had secured the mortgage or not, he must have known the land was held in some way as security for Gaylord's debts. All the circumstances pointed to this. Fish wanted to raise the amount of these notes, not to sell the land for the highest price he could get. Lichtenstein must have known that the lot renting for one hundred and fifty dollars per month was worth more than seven hundred and fifty dollars.

If he was in any doubt about the transaction, he knew Gaylord; paid his rent to him monthly, and could have inquired. *If Durgan held the land as security it was his duty to sell it for the best price he could get; not to sacrifice it for the amount of his debt.

If the debt secured by the deed only amounted to ten

hundred and forty dollars and interest, say two hundred and eighty-five in all, two months' rent would have satisfied it. All he had to do was to require Lichtenstein to pay his rent to Fish instead of Gaylord for two months, and there was an end of the matter. If Gaylord was bound for the other two notes, and he could tack them to his mortgage, the same course for five months would have paid the whole. Lichtenstein having purchased under these circumstances, is in this dilemma:

He must stand as the purchaser in good faith of the mortgagee's interest, or he must stand convicted of a fraudulent contrivance and combination with the mortgagee to attempt to deprive the mortgagor of his right of redemption.

Durgan's position was that of a mortgagee with power to sell. To say that a mortgagee with power to sell, who has an incumbrance on the estate of less than one-third of its value—an incumbrance which five or six months' rent will discharge—has the right to sell the estate absolutely to the first man he meets who will pay the amount of incumbrance, without any attempt to get a larger price for it, would in our opinion be equivalent to saying fraud and oppression shall be protected and encouraged.

The most favorable position for Lichtenstein to occupy is that of a *bona fide* assignee of the mortgagee's estate.

The findings of the referee's report, perhaps, entitles him to that position. There is no finding of fraud.

If he was the *bona fide* assignee of the mortgaged estate, what then should have been the decree? Lichtenstein was renting the premises at one hundred and fifty dollars per month. He bought up the mortgagee's interest and stood as mortgagee in possession. As soon as the rents extinguished the debt of seven hundred and fifty dollars, he must surrender the premises to mortgagor or become liable for the rents. Lichtenstein held the premises from the 15th of February, when Fish made the deed, to November 5th, when report of referee was filed—say for eight and two-thirds months. The rent for this period was *one [*130] thousand three hundred dollars. So after allowing the most liberal interest on the seven hundred and fifty

Opinion of the Court—Beatty, J.

Monday of January, 1867, and until their successors are elected and qualified."

The only question for us to determine is, was the relator on the 31st day of October, 1864 (the day the Constitution took effect), a county officer under the laws of the Territory of Nevada? Counsel for relator say the Constitution applies the term "officer" as well to those elected as to those who are actually in office, and refer us to several sections where the word *officer* is used when alluding, not to those in office but to those elected to fill an office at a future day. Those who have been elected but not inducted into office, are, properly speaking, *officers elect*; those in office are simply *officers*; those who have been in office, but have gone on or are properly *ex-officers*. It is very proper, in either conversation or writing, when speaking of an *officer elect*, to leave off the suffix, and style him simply an officer, if the context of the sentence shows you are speaking of one not yet inducted into office, but who is to be at a future day; so, too, in speaking of an *ex-officer*, you may leave off the prefix under like circumstances. But if the term "officer" is used in a sentence where there is nothing to qualify or control its meaning, everybody understands it refers to an officer then holding and enjoying the office.

It means neither an *ex-officer* nor an *officer elect*. Section thirteen of the schedule the term "officers" means those persons who may be actually holding the office referred to when the Constitution is adopted, and not to *ex-officers* who may have held them at some time past, nor to *officers elect* who might expect to hold them at some future date.

The Constitution provides for "continuing" the *existing* [*133] officers in office. *The question, then, is, was the relator a county officer on the 31st day of October, 1864?

Respondent goes into an argument to prove appellant's term had expired before the 31st day of October, and therefore he (respondent) must have been the assessor on that day. We are unable to see the force of this argument. The law fixed with precision the day when respondent should *go into office*, to wit, the first Monday of January, 1865. B

Points decided.

fore that day he had, we think, no pretense of claim to the office.

If it were absolutely necessary that an office should *always* have an incumbent, we might hold that an officer from necessity would hold until the election or appointment and qualification of his successor.

But we know of no rule of law by which this court can create an officer, or say that one shall enter into the office in advance of the time fixed by law.

But we do not read the laws of the territory as counsel for respondent do. There was nothing in the law of 1861, as we stated in the beginning of this opinion, which limits the term of an assessor strictly to two years. The time for holding the office, under the law of 1862, is nowhere stated in direct terms; and if the time of holding were not limited by implication, it would be for life or good behavior. But a successor is authorized to be elected every two years, and the statute being silent as to when he shall qualify, the reasonable inference is, he may qualify as soon as he gets his certificate.

The law of 1864 provides, in express terms, that the assessors elected in 1864 shall not qualify until January, 1865. Consequently, the former assessor must have held over to January, 1865. There are other points made in relator's brief, but the points we have passed on settle the case, and it is not necessary to notice the others.

The judgment is reversed, and the court below directed to enter judgment for the defendant.

E. J. ARMSTRONG, APPELLANT, v. A. S. PAUL ET AL.,
RESPONDENTS.

[1 NEVADA, 134.]

¹ JURISDICTION OF ACTION OF FORCIBLE ENTRY AND UNLAWFUL DETAINER.—
Though the Constitution of the State confers the jurisdiction of cases of forcible entry and unlawful detainer on the district courts, the courts of justices of the peace continue their jurisdiction of such cases until the organization of the district courts under the State authority.

(1) See 8 Nev. 84.

Opinion of the Court—Brosnan, J.

IDEM—SECTION SIX, ARTICLE VI, OF CONSTITUTION, CONSTRUED.—The purpose of section six, Article VI, of the State Constitution was not to suspend the operation of the laws of the territory. The former judiciary system was intended to be, and was continued in existence until the new one should be in a condition to exercise its functions.

JURISDICTION OF JUSTICES OF THE PEACE.—The organic act of the territory limiting the jurisdiction of justices of the peace to cases where the debt or sum claimed does not exceed one hundred dollars, is applicable to an action in tort for damages, as well as to an action on contract.

APPEAL from the Probate Court of Storey County, Hon. L. W. FERRIS presiding.

The facts of this case sufficiently appear in the opinion—

Perley & De Long, for Appellant.

Robinson & Foster, for Respondents.

[*137] *By the Court, BROSNAN, J.:

The facts material to be noticed in this case are as follows:

Armstrong instituted suit before a justice of the peace against the respondents, under the forcible entry and unlawful detainer act, to recover possession of the "International Hotel," in the city of Virginia. Summons was issued on the 3d, returnable on the 17th day of October, 1864. The plaintiff alleged the monthly rents to be twelve hundred dollars, and in his complaint claimed five thousand dollars damages to be trebled. On the return day of the summons the parties appeared, and the case was continued until the 22d day of October. On that day the case was further adjourned, and set for trial on the 28th, and the defendants ordered to serve and file an answer on the 24th day of October, 1864. On the day of the trial, the defendants moved to dismiss the case because the summons was returnable more than ten days after it was issued, and for the further reason that it did not have on a revenue stamp. The justice thereupon affixed the proper revenue stamp, and overruled the motion. A motion was then made to dismiss the case on the ground that by the Constitution of the State, jurisdiction over cases of this description was vested in the district courts, and for the reason that the amount claimed

Opinion of the Court—Brosnan, J.

was over three hundred dollars. This motion was also denied by the justice. The case was tried by a jury, a verdict rendered for the plaintiff, and a judgment for four thousand four *hundred and fifty-nine dollars and [*138] fifty cents was entered by the justice on the 2d day of November, 1864.

The defendants below appealed from the judgment of the probate court of Storey county, and that court dismissed the case for want of jurisdiction in the justice. From this judgment Armstrong appeals to this court.

It is not necessary to inquire in this case what may be the legal effect or consequence of the omission to place a revenue stamp upon the summons, or whether one may not be affixed by the justice, as was done in this instance; because we hold that the objection to the summons on that ground came too late, having been first made some days after an appearance and answer by the defendants. We proceed, therefore, to determine whether the justice had jurisdiction.

It is argued by the respondents' counsel, that upon the adoption of the State Constitution in the month of September last, or if not then, upon the date of the President's proclamation admitting Nevada as a State, which was on the 31st day of October, 1864, that jurisdiction in actions of forcible entry and unlawful detainer became vested in the district courts exclusively. The argument is based upon Art. VI, section 6 of the Constitution. This section is undoubtedly intended to confer this jurisdiction upon the district courts; but, of course, it could not attach until such courts should be created and operative. The Constitution must be so interpreted as to give a practical meaning and efficacy to all its parts, if possible. It will be seen upon examination of section eighteen in the same article (Art. VI, sec. 18), that no judicial officer was superseded, nor the organization of any court of the territory changed, until the several officers provided for in that article should be elected and qualified. District judges are officers therein designated. They were to be elected at the general election in November, 1864, and those then elected were required

Opinion of the Court—Brosnan, J.

to qualify and enter upon the duties of office on the first Monday of December succeeding their election. (Con., Art. XVII, schedule, sec. 1.) Certainly they had no power or authority to act as district judges before their qualification as such. Again, the Constitution provides that all laws of the territory, not repugnant thereto, should remain in force, etc. (Con., Art. XVII, sec. 2, schedule.)

[*139] *By these provisions, justices of the peace at their courts, and the statutes hitherto governing them, were continued until changed or superseded by the new order of things. This would leave no void nor delay in the administration of justice. But if the construction respondents' counsel were correct, there would be no court in existence from October 31st to the 5th day of December following, to take cognizance of this case, or of any case of the like kind.

This is not reasonable. In whatever else the framers of the Constitution may have failed to provide against possible exigencies, they certainly are not chargeable with so gross an oversight.

The purpose of section 6, Article VI, was not to suspend the operation of any portion of the laws of the territory. The former judiciary system was intended to be, and was continued in existence until the new one should be in condition to exercise its functions. It follows, therefore, that the justice did not lose jurisdiction during the interval above mentioned, as counsel contend.

Aside from the common-sense view thus taken by the court, we are fully supported by authority. The identical question has been raised and decided in California since the adoption of the recent amendments to the Constitution of that State. In the matter of *Carlos Oliveres* (21 Cal. 41) the point is discussed and determined.

Had the case rested here, the judgment of the probate court should be reversed without further comment. From the record, outside of the transcript from the docket of the justice, shows that a further objection to the jurisdiction was raised, viz., that the organic act of the territory limited the jurisdiction of justices to demands not exceeding C

hundred dollars; and that the demand in this case exceeded that amount. As this question of jurisdiction is one that may be raised at any time, we cannot overlook this objection, notwithstanding it is not manifest at what stage of the proceeding it was made. Not appearing in the minutes of the justice, we assume it was first advanced before the probate court.

In the act of congress organizing the territory, it is provided that justices of the peace shall not have jurisdiction in *any case where the title to land may be [*140] in dispute, "or where the debt or sum claimed shall exceed one hundred dollars."

It is claimed by the counsel of appellant that this limitation relates only to matters of contract, as money demands, and not to actions *ex delicto*, and consequently that the present action is not within the purview of the act. To sustain this position, we are referred to decisions made by the supreme court of California, wherein that court has held that in actions of this character justices of the peace are not limited as to the amount of damages to be awarded, notwithstanding they are so limited in other actions.

It is unquestionably true that the courts of that State have so decided in several instances, but it must be remembered that there was no constitutional restriction imposed in California upon the legislature in the grant of jurisdiction in this action to justices of the peace. On the contrary, the action of forcible entry, etc., was held in California as belonging to that class of "special cases" mentioned in the Constitution of that State which the legislature was at liberty to dispose of as its wisdom should dictate. Accordingly, the legislature did lodge original jurisdiction over this "special" action in courts of justices of the peace. And as no other court had original jurisdiction, it was necessary to the administration of full and complete justice that such courts should possess the power to award damages commensurate with the degree and character of the injury sustained by the complainant, although the amount might exceed the limit of their jurisdiction in other cases. (Vide *Small v. Gwinn*, 6 Cal. 449.)

Opinion of the Court—Brosnan, J.

But our organic act had not intrusted such power or discretion to the territorial legislature. Therefore, while entertain great respect for the decisions of the supreme court of the State of California, we do not regard them up this question as controlling authority.

From the language of the act there is no escape. The justice shall not have jurisdiction "when the debt or *sum claimed* shall exceed one hundred dollars." Can language be more explicit? There is no exception; it embraces all cases cognizable in justices' courts, whether they arise from contract or in *tort*. And upon reflection I am unable [*141] to see any good reason for the distinction claimed by counsel. Actions in *tort* are generally more complex and difficult to dispose of than actions growing out of such contracts as usually come before a justice of the peace. And when the law limits the jurisdiction of the more simple action to a certain fixed amount, it would reasonably follow *a fortiori*, that the law would equalize it in the more complicated case.

I conclude, then, that as to the amount of damages claimed the justice had not jurisdiction. Nevertheless, the probate court, in my judgment, erred in dismissing the case. The action was for the possession of the premises—of this matter the justice had jurisdiction—and the plaintiff should not have been turned out of court without a trial. The prayer for damages might well have been disregarded and expunged without prejudice to the action or injurious affecting any right of the defendants. The complaint set out a good cause of action, and should not have been dismissed for having contained a prayer for relief not within the jurisdiction of the court. No damages need be stated or claimed.

The authorities so declare, as will appear upon examination. (*Howard v. Valentine*, 20 Cal. 282; *Van Etten v. Jilso*, 6 Cal. 19, 413-449; *Holmes v. Horber*, 21 Cal. 55.)

The judgment of the probate court will therefore be reversed. Ordered accordingly.

BEATTY, J., having been of counsel, did not participate in the decision.

Points decided.

**ARMSTRONG, APPELLANT, *v.* PAUL ET AL., RESPONDENTS.
FORCIBLE ENTRY, ETC.**

[1 NEVADA, 141.]

By the Court, BROSNAN, J. :

The facts of this case, and the questions of law involved therein, are in all respects like to those in another case between the same parties, decided at the present term of the court. The same judgment will be entered in this case as in that case. Ordered accordingly.

BEATTY, J., did not sit in this case.

**VAN VALKENBURG ET AL., APPELLANTS, *v.* HUFF ET AL.,
RESPONDENTS.**

[1 NEVADA, 142.]

¹ **STATEMENT ON APPEAL.**—Papers and evidence copied into a transcript, without any certificate from the judge or clerk that the same were used or referred to on motion for new trial, do not constitute a statement on appeal.

INSTRUCTIONS—GENERAL RULE OF LAW—EXCEPTIONS.—When a court is laying down a general rule of law, it is not improper to notice exceptions to the general rule or such circumstances as will prevent its operation.

MINING CLAIMS—ESTOPPEL.—When A. first locates a ledge on certain croppings extending eight hundred feet northward and southward, B. afterwards locates a claim near by and is encouraged to go to work by A., who declares it to be his opinion that there are two ledges and that their claims will not interfere. Afterwards it turns out there are in fact two distinct ledges running into the earth at different angles, and widely diverging as they go down, but both mingling their croppings together where A. made his older location, the declarations of A. are evidence he located but one ledge, and may operate as an estoppel against his claiming both.

POSSESSION OF TENANT IN COMMON.—Until there is some decisive act to show an ouster or adverse possession, the possession of one joint tenant, or tenant in common, inures to the benefit of all co-tenants.

MINING CLAIMS—POSSESSION OF LOCATOR.—If A. locates a mining claim in the name of B., occupies and works on it, but uses B.'s name, and does all acts in his (B.'s) name, he cannot maintain any action for the claim in his own name. The law would consider his possession the possession

(1) See 5 Nev. 206; 10 Nev. 282.

Opinion of the Court—Beatty, J.

of B. He could only acquire an independent right in the claim by abandoning the first location and re-locating in his own name. His right would date from second location.

APPEAL from the District Court of the Third Judicial District, Territory of Nevada, Hon. H. M. JONES presiding.

Pitzer & Williams, for Appellants.

Stewart, Baldwin & Hillyer, for Respondents.

The facts are stated in the opinion.

By the Court, BEATTY, J.:

In this case the respondents contend there is no statement on motion for new trial; and that in the absence of such statement this court cannot review the action of the court below in refusing a new trial. The verdict was rendered and judgment entered by the clerk on the [*143] 24th day of March, 1863. *On the 26th day of March, 1863, a notice of motion for new trial was served. This notice appears to be formal and correct.

On the 3d day of April, another paper is served on respondents' counsel, which is headed "motion for new trial." Then in the body of the paper follows a notice that a new trial will be moved for, on a specified day; that the motion will be founded on certain grounds, viz., that the evidence is insufficient, etc. Then follows a statement that certain writings, notices, etc., will be relied on in support of the motion.

This is a rather informal statement, yet it is, in my opinion, a good one. If the papers and documents referred to are sufficient to show error in the court below, then appellants should have a new trial. But whilst this statement was sufficient for the motion in the court below, there seems to have been no steps taken to identify the papers used in that court.

There is no statement on appeal. There is no certificate of either judge or clerk as to whether the papers copied or transcript were the papers used or referred to in the court below on the motion for a new trial. Reference is made

the statement to the testimony as taken down by a shorthand reporter appointed by the court. There is a large mass of evidence included in the transcript, but there is nothing to show it is the evidence taken down by the reporter, nor, if taken by him, whether it is a part or the whole of the evidence. No certificate of either judge, clerk, or reporter, is attached to the evidence. The judge certifies to the instructions given and refused, and the exceptions taken to his rulings in regard to instructions. But beyond this there is no certificate to anything, unless it be the clerk's certificate to filing a paper, or some matter of that sort. Any private citizen could make out such a transcript and put in it any evidence he saw proper, and violate no law that we know of in so doing. The transcript is made up of a medley of different kinds of paper of various sizes, colors and shapes, written, much of it, in a hand that is almost illegible. Had such a transcript been filed at or just before the present term of the court, we would certainly have required the appellant to file a proper transcript duly certified, or else dismissed the appeal. But as the case *came [*144] to us from our predecessors in office, and no action was taken by them for correcting the transcript or dismissing the appeal, we have waded through it and examined all the evidence presented therein.

It is proper, however, to say that nearly all the evidence appears to have been given with reference to certain maps which were before the jury. Those maps do not accompany the transcript. Therefore, much of the testimony which relates to the relative locality of the works of the plaintiff and defendants, is totally unintelligible to the court.

Looking, then, to the pleadings, and so much of the testimony as is intelligible, the facts of the case appear to be as follows:

In June, 1860, a claim was located by certain parties known as the Comstock Continuation Company, near the Devil's Gate, in Lyon county. The location was made of a ledge, and the notice placed on certain croppings of quartz, and claimed eight hundred feet northerly and southerly therefrom. In June, 1860, defendants made a location on

Opinion of the Court—Beatty, J.

a ledge in the same vicinity, and commenced work on same.

When the plaintiffs and their predecessors made location of the Comstock Continuation claim, they inserted among the names of the locators, H. Mason, T. Stone and William Miles. These were the names of certain parties living in the State of Illinois, and most probably heard of their names being used in the location of claim. These names were inserted in the notice as an instance of Moses Driscoll, Mark Peters and Christian Gings. Each of the three last-named parties had the name of a friend in Illinois placed in the notice, intending the location to be for their own benefit, but using a false name either to conceal their own connection with the company, or from some caprice or other motive into which it would be useless to inquire. Both companies went to work and continued to prosecute their works with considerable labor and expense up to 1862.

There is some evidence to show that from 1860 to 1862 the two companies worked amicably in the same immediate vicinity, supposing that they had separate and distinct locations.

Inclines and shafts, tunnels and drifts, were driven [*145] into the hill where the ledge or ledges are situated by both parties, and in 1862 the works of the two companies began to interfere with each other. This interference brought on a quarrel, and finally a personal conflict between the workmen of the two companies. The plaintiff (the Comstock Continuation company) proving the work to be at least belligerent, withdrew from the conflict and brought suit.

The evidence would seem to indicate the plaintiffs were in the right where they had a right to be when they were assaulted. But this action, if we understand it, is in the nature of an ejectment, and even if plaintiffs were assaulted on their ground, this could not give them a right to recover ground in ejectment which belonged to defendants. Although there may have been an unjustifiable assault on plaintiffs made by some of the defendants or some of their servants, *it does not affect the question in this case.* That question

Opinion of the Court—Beatty, J.

is, who is entitled to the possession of the ground, or mining claim, or ledge of quartz, described in the complaint?

The plaintiffs relied on the proof of their prior location, constant work of their claim, and the *opinion* of divers witnesses that there was but *one* ledge there, and all the works of both companies were on that ledge. Also, on the facts that if there were two ledges, still the croppings were all mingled together, and their location of a claim or ledge on those croppings would give them a right to all ledges which outcropped at that place.

Defendants, on the other hand, introduced some evidence, and the opinion of many witnesses, to show that there were two distinct ledges; that while the two ledges came together and mingled their croppings on the surface, that underground they were distinct ledges, separated by bed rock and constant diverging; the one being nearly perpendicular, and the other having a much greater inclination. That their location was made about two years past as of a separate ledge, since which time they had continuously worked it. That the plaintiffs know of their claim and work done there for a long time past, and made no objection until recently.

With this general view of the facts, the question to be *determined by this court is, were the in- [*146]structions given by the court below correct, or were they erroneous and prejudicial to the plaintiffs?

Before examining the instructions complained of, we will say that the foregoing statement embraces all the facts which appear to us material, so far as we are able to understand them from the transcript before us, giving full weight and effect to anything therein contained. If we had had the maps, a copy of the notices of location, etc., before us, possibly some other material facts might have been shown. But we can only examine this case as far as it is made intelligible by the transcript.

The first assignment of error is this: That the court, after stating what a miner acquires by posting notices, etc., goes on to say those rights will hold good against subsequent locators, "unless there should be an abandonment or extinguishment in some form, in whole or in part, of such original

Opinion of the Court—Beatty, J.

claim." It is contended that the qualification expressed by the words within the quotation marks, was inapplicable to the state of the evidence and pleadings in this case, and calculated to mislead the jury.

It is not pretended that the principles contained in that qualification are against law, but that there is nothing in the case to give point or effect to this qualification. If there were nothing in the case to give point or effect to this qualification, we think it would not afford the appellants any grounds of complaint.

When a judge is laying down general rules in regard to established principles of law, it is not improper for him to allude to exceptions to the rule, or to notice such circumstances as would prevent its operation.

But we are of the opinion that the qualification in this case was proper and necessary, in order to fairly submit the case to the jury. If we admit that the location of the plaintiffs was sufficient to make a valid claim to all the ledges outcropping at that place, still, if after the location, they went to work on one ledge, and the defendants, with their knowledge, went to work on another ledge alongside of them, and plaintiffs instead of objecting, encouraged the defendants

to go on by saying that they thought there would be no interference between the two companies, that if they were on different ledges, this might be held as either evidence of abandonment of the ledge worked by the defendants, or it might be held as an estoppel against the plaintiffs. There certainly was some such evidence as this. We therefore think the qualification was proper.

The next error complained of is that the court gave the third instruction as follows: "If the outcroppings of quartz ledges be mingled, confused and blended, upon or near the surface of the ground, and a person or persons supposing these croppings belong to and be connected with a single ledge or lode—locate claims thereon as upon a single ledge, they do not thereby become entitled to claim both ledges; they must make their election within a reasonable time which of said ledges they will take by virtue of their location. If they should fail within a reasonable time

Opinion of the Court—Beatty, J.

to elect and choose which of said ledges they would take by virtue of their location, and other persons should, in good faith, subsequently locate claims upon one of said ledges, and go into the possession thereof, the right of election of such prior locators would be taken away as against such subsequent locators, and they would be confined to their claims upon the other of two ledges."

This instruction seems to be the one covering the most important ground in this whole controversy. The evidence shows (if we consider it as before us) that the plaintiffs located a claim on certain croppings extending eight hundred feet each way, northerly and southerly, from where the notice was posted. The notice is not to be found in the transcript, and we cannot tell what its language is. Whether its terms are sufficiently broad to include several ledges, or only one, we cannot tell.

Neither are there any mining laws set out in the transcript whereby we might determine whether a company locating a claim on a hillside, would be entitled to locate only one ledge, or might be entitled to locate all on the hillside from top to bottom, or from one base to the other of the hill. We are left in the dark as to many things which might be important in determining the propriety of this instruction.

We do know, however, that whilst the plaintiffs were the first locators (in January, 1860), the defendants located shortly after on their ledge, and there appeared to be no objection by *the plaintiffs, but an opinion [*148] was expressed by one of the locators of plaintiffs' claim, and one who was actually engaged at work on it, that there was no conflict in the two claims.

This would indicate that plaintiffs tacitly admitted that if there were two distinct ledges, defendants were entitled to the one on which they were at work.

It would seem to be an admission, too, that they (plaintiffs) located but one ledge, and did not claim all ledges outcropping at the place. Under these circumstances, we are inclined strongly to the opinion that the plaintiffs were entitled to only one ledge. If so, this instruction would seem to be perfectly fair, and to present the case to the jury

Opinion of the Court—BENNETT, J.

as it should have been presented. If there were two (and the jury certainly must have so believed to find defendants), the plaintiffs were at work on one, and the defendants on the other. The work of plaintiffs on one was an election of that ledge. There was nothing in the instruction prejudicial to plaintiffs, if they only had rights in one ledge.

The third assignment of error is, that the court gave a certain instruction in regard to the possession of joint tenants, and tenants in common, to the effect that the possession of one was the possession of all, except when a decisive act was done by the one in possession, amounting to an ouster of his co-tenants.

Our answer to this assignment of error is, that there is nothing wrong in the instruction, and if there is anything technically wrong in the language used, we cannot see how it could injuriously affect the appellants.

The fourth assignment of error is, that the court gave an instruction in these words:

"No person can claim title to mining ground under a location made by posting and recording a notice, except whose names are in the notice, or those who claim by derivation of title under such original locators. A claim in the name of one person, does not inure to the benefit of another, simply because of an intent on the part of the one, at the time of the making the location, that it should inure to his own benefit.

"Where parties claim under a location [*149] under the mining rules, their title cannot be acquired in inception prior to date of a notice of location in which their names, or those of their grantors, appear.

"A party in whose name a location of a mining claim is made, is presumed, *prima facie*, to assent to the same. The possession of a portion of tenants in common of a claim is, in law, the possession of their co-tenants. If a location is made in the name of certain persons, and they desired to substitute other and different names for a portion of the original locators, this can only be done by a re-location of the claim. If such re-location be made, the

Opinion of the Court—Beatty, J.

of some of the original locators and claimants being inserted in the notice of re-location, together with other and new names substituted in the place of one or more of such original locators, such re-location can be invoked as against third persons, and in behalf of such subsequent re-locators, only from the date of such re-location. The claim of those parties whose names are in the original notice, and also in the notice of re-location, would, if they continued in possession of the claim without abandonment up to the date of re-location, still hold good under their original notice, and be entitled to whatever priority of right it would give them, unless, at the time of making the re-location, they should abandon their claim under the original notice”.

It will be recollected that when the plaintiffs' claim was located, that three of the parties who participated in having the location made, to wit, Driscol, Peters, and Higgings, instead of having their own names inserted among the locators each selected the name of a friend living in Illinois, and had such name placed on the notice. Afterwards a request was made of the recorder of the mining district to have the names of Driscol, Peters and Higgings substituted in place of their absent friends whose names had been used in the first place.

But counsel for appellants complains that there was no evidence of re-location introduced. We think there was some evidence on this head. But if there was none, so much the worse for him. If there was no re-location, Peters, Driscol and Higgings had no title whatever, and neither they nor those claiming under them, could recover in this action. The *appellants cannot complain that [*150] the hypothetical case put by the court was more favorable to them than the facts of the case would justify.

We think if there was any error in this instruction it was not against appellants, but in their favor.

We are of the opinion that if Higgings, Peters and Driscol had any rights which could be asserted in this action, they date from a re-location subsequent to defendants' location.

But, say counsel for appellants, Higgings, Peters and Driscol were in actual possession of the mine from June,

Points decided.

1860. If they were in possession, it was a possession giving them no right of action. Their position was that of servants or employees of their owners.

The whole claim was held in the name of others. If they chose to put themselves in the position of employees or representatives of Mason, Stone & Miles, the law will hold that whilst they occupied the position their principals and not themselves were liable for the operation of the mine. What we have said about the instruction quoted is equally applicable to the instruction given by the court.

We can see no error in it. The eleventh and last instruction embraces the same principles laid down in the tenth.

As in our opinion that instruction was not correct, neither is there any error in the eleventh and last instruction.

The evidence as to whether there are one or two claims is, we think pretty well balanced.

The preponderance seems rather to have been in favor of the claim than against the finding of the jury. Certainly nothing in the evidence to justify this court or the court below in interfering with the verdict.

The judgment of the court below is affirmed.

CALIFORNIA STATE TELEGRAPH COMPANY
v. J. C. PATTERSON, RESPONDENT

[1 NEVADA, 150.]

¹ JUDGMENT, WHEN FINAL.—A judgment is as final when pronounced by the court as when it is entered and recorded by the clerk as required by statute; the judgment is the judicial act of the court; the entry is the ministerial act of the clerk.

² IDEM.—If the decision of the court finally disposes of the action, no further is to be done by it to complete that disposition.
[*151] *a final judgment from which an appeal will lie until the judgment is perfected by entry in the judgment book.

(1) 10 Nev. 446.

(2) 1 Nev. 516; 10 Nev. 405; Humboldt M. & M. Co. v. Terry, 11

Opinion of the Court—Lewis, C. J.

¹ **WHAT CONSTITUTES A JUDGMENT—RIGHT OF APPEAL.**—The decision of the court is the judgment; the entry by the clerk is the evidence of it merely. The right of appeal under our practice act does not depend upon the entry or perfection of the judgment of the lower court, but upon the rendition of it.

PLEADING—CONCLUSION OF LAW.—The allegation that defendant became indebted to plaintiff is simply a statement of a conclusion of law; the facts out of which the indebtedness arose should be stated.

² **ITEM—WHEN AMENDMENTS SHOULD BE ALLOWED.**—If, instead of demurring, advantage be taken of a defective pleading by motion for judgment, the court should permit an amendment of the pleading where an amendment will cover the defect, the same as if a demurrer had been interposed.

FINAL JUDGMENT.—When a judge orders a judgment in a cause, and that order is entered on the journal or minutes of the court, and no further facts are to be ascertained to determine the extent, amount and character of that judgment, but there simply remains the clerical duty of entering in the judgment-book that which the court has determined and ordered to be entered, this is a final judgment from which an appeal lies.

APPEAL from the District Court of the Second Judicial District of the State of Nevada, Hon. S. H. WRIGHT presiding.

The facts are sufficiently stated in the opinion.

Ellis & Sawyer, for Appellant.

Alvater & Flandreau, for Respondent.

*By the Court, LEWIS, C. J. : [*154]

Two questions are presented for our consideration in this case:

First. Was the appeal to this court prematurely taken? and

*Second. Does the complaint state facts sufficient [*155] to constitute a cause of action?

On behalf of the respondent it is claimed upon the motion to dismiss the appeal, that at the time it was taken no final judgment had been rendered by the court below, and that therefore the appeal was premature, and should be dismissed. If the record substantiates this position, the mo-

(1) 10 Nev. 446.

(2) See 2 Nev. 326; 3 Nev. 498.

Opinion of the Court—Lewis, C. J.

tion most certainly should be sustained; but if our view of what constitutes a final judgment be correct, the counsel's premise is false, and his conclusions erroneous. This motion seems to be based upon a misapprehension of what constitutes a judgment, and counsel seem to have confounded the judgment itself with the entry or record thereof. The judgment is a judicial act of the court, the entry is the ministerial act of the clerk. The judgment is as final when pronounced by the court as when it is entered and recorded by the clerk, as required by statute. If the record discloses that the decision of the court finally disposed of the action, and nothing further was to be done by it to complete that disposition, that surely was a final judgment from which an appeal would lie, whether it were perfected by entry in the judgment-book and docket, or not. It is the act of the court which renders the judgment final, and not that of the clerk, whose only office in this respect is to put in form and record what the court has previously declared. The decision of the court is the judgment, the entry by the clerk is the evidence of it merely. (*Fleet v. Young*, 11 Wend 522; *Lee v. Tillotson*, 4 Hill, 27.)

Tracy, Senator, in the case of *Fleet v. Young*, *supra*, says "But it strikes me that the more obvious and natural import of the expression, 'rendering of such judgment,' is the annunciation or declaring the decision of the court, indicated by the rule for judgment." In *Lee v. Tillotson*, Justice BRONSON uses the following language upon a question analogous to that made upon this motion: "The question then is, whether the limitation dates from the final determination of the court, which was made in July term, 1840, or from the subsequent filing of the judgment-record in January 1841. The statute provides that all writs of error upon any judgment or final determination rendered in any [*156] cause, shall be brought within *two years after the rendering of such judgment or final determination, and not after. The judgment or final determination in this cause was rendered in July term, 1840, when the motion which had been made to set aside the report of the referee was denied. The record which was afterwards filed was no

Opinion of the Court—Lewis, C. J.

judgment, but only a written memorial of the judgment which had been previously rendered."

These authorities clearly support the proposition that the decision of the court, and not the act of the clerk, is what constitutes the judgment. The statute, Sec. 285, p. 363, provides that—

"An appeal may be taken to the supreme court from a judgment rendered in an action or special proceeding commenced in those district courts, or brought into those courts from another court."

The only question to be determined then, is whether there is a final judgment in this case or not, and not whether a judgment is properly entered on the records of the court. The right of appeal under our practice does not depend upon the entry or perfection of the judgment of the lower court, but upon the rendition of it. In New York, under the code, when an appeal was authorized only from a judgment *entered*," a different rule prevailed, and it was held that an appeal would not lie until the judgment was entered and perfected. But the distinction between the language of the code and the practice act of this State, is obvious. The code only authorized an appeal from a judgment *entered*;" the practice act of this State allows it from a final judgment. True, the record must show that the court rendered the judgment, and the entries should be sufficiently ample to enable the appellate tribunal to ascertain its nature and extent.

If these facts sufficiently appear by the record, the appeal should not be dismissed for any defect in the entry of judgment, nor indeed where no entry at all is made in the judgment-book. Sandford, Senator, in the case of *Mon v. Shotwell* (12 John. 63), in which this exact point was made, says: "The question is, therefore, not to be determined by technical definitions and verbal criticism, or the terms and phrases in which judgments have been or may be expressed. *The true inquiry is [*157] whether the judicial proceeding constitutes a cause in itself, and has received its final decision in the supreme court."

Opinion of the Court—Lewis, C. J.

In the case under consideration the following facts appear in the settled statement. On the 19th day of October, A.D. 1864, the case having been called, the defendant's counsel objected to the introduction of any testimony on behalf of plaintiff, for the reason that the complaint stated facts sufficient to constitute a cause of action. After the argument of the objection, it was sustained and the action dismissed. Here is sufficient to show the judgment of the court finally disposing of the action, and we think, to sustain the appeal. It would have been in practice, however, to have had the judgment fully argued and perfected before the appeal was taken.

The second point arises upon the sufficiency of the complaint upon which this action is brought, and we hesitate in saying at once that it is radically defective. The most material allegations necessary to support the complaint are omitted, and the facts alleged are stated in general and vague a manner everything is left to conjecture and inference. It alleges that "on the 17th day of October, A.D. 1864, at Carson city in said county of Ormside said defendant became indebted to the said plaintiff for a sum of four hundred dollars, for so much money, and before that time, had and received, and in consideration thereof, then and there promised to pay the said sum thereunto requested." Then follows the allegation that though requested the defendant had refused to pay, and the complaint so general, uncertain and inartistic, we would not, even in the most liberal practice observe the code, be held good on general demurrer. The allegation that defendant became indebted to the plaintiff is merely a statement of a conclusion of law; the fact upon which the indebtedness arose should have been stated. This is attempted to be done by the statement which follows: "For so much money had and received." This is too general and uncertain. From whom was the money had and received? For whose use and benefit?

It would be as consistent to the language to say that [158] defendant *received the money from a stranger or plaintiff; and for his own use and benefit.

Opinion of Beatty, J., on petition for rehearing.

plaintiff's. If the rule that in the construction of pleadings that most unfavorable to the pleader is to be adopted, should be followed in this case, the plaintiff would not be considered to have stated any cause of action whatever against the defendant.

Whilst we think this complaint utterly insufficient, we think also, that the court should have allowed an amendment, and permitted the cause to proceed. The practice of taking advantage of a defective pleading by motion for judgment, or by objection to the evidence, instead of by demurrer (where a demurrer will lie), should not be encouraged by the courts. The practice act directs how advantage may be taken of defective pleading, and that course should be pursued, if possible, in preference to any other. In that case, if a demurrer be sustained, the pleading may be amended and the cause proceed to trial upon its merits, usually without injury to either party. If counsel, instead of demurring, answer to the merits, and then move for judgment, or demur to the evidence, the court should permit an amendment of the pleading, where an amendment will cover the defect. Parties should not be allowed to secure any greater advantage by such practice, than they would gain by demurring at the proper time. The objection interposed to the evidence in this case, was in fact nothing more nor less than a demurrer, and we presume the counsel for plaintiff was taken by surprise, and the court probably induced to render a judgment, which, upon reflection, would not have been given. Leave to amend having been promptly asked, we think it should have been allowed.

The judgment of the court below is reversed, with leave granted plaintiff to amend his complaint. The costs of this appeal to abide the event of the suit.

By the Court, BEATTY, J., on petition for rehearing:

In this case a petition for rehearing has been filed, and we are requested, not only to examine the petition, but to examine the authorities referred to in the original brief of respondents. *After a careful examination of all [*159] the points, both in petition and original brief, we are

Rev. Dec.—9

Opinion of Beatty, J., on petition for rehearing.

unable to see any error or mistake in the opinion already filed in the case. There is some force in the remarks of counsel as to the term "rendered." We can see the word may have been used rather in connection with the designation of the courts, from the judgment of which an appeal might be taken, than as indicating the kind of judgment subject to review in this court. But if we read the statute omitting the word "rendered," it reads thus: "An appeal may be taken, etc., from a final judgment, in an action," etc.

Here there is a general authority to appeal from a "final judgment." Our opinion is that a judgment may be final although it is not recorded in a judgment-book or entered in a judgment-docket. Every court keeps a journal minute of its proceedings.

When a judge orders a judgment in a cause, and the order is entered on the journal or minutes of the court, and no further facts are to be ascertained to determine the exact amount and character of that judgment, but there simply remains the clerical duty of entering in the judgment-book that which the court has determined and ordered to be entered, this, in our opinion, is a final judgment, from which an appeal lies. It is final because the court has nothing more to do with it, unless it be to compel the clerk to perform his duty in entering it up. The law might require that no appeal should be taken before the judgment was regularly entered in the judgment-book, and the judgment-roll made up and filed. But our law has made no such provision, and therefore an appeal may be taken whenever judgment is *final*. In this case we think there was a *final judgment* before the appeal was taken.

We are of opinion that none of the authorities cited by respondent conflict with this view of the case, and none of them fully sustain our opinion as to what constitutes a final judgment.

The 144th section of our practice act reads thus: "A judgment is the final determination of the rights of the parties in the action or proceeding, and may be entered on term or vacation." There is nothing in this definition of judgment conflicting with our views.

Opinion of Beatty, J., on petition for rehearing.

When the draftsman of the practice act, in referring to the *filing of the undertaking on appeal, [*160] says, it shall be filed with "the clerk with whom the judgment or order was entered," he certainly did not use that expression to point out the character of judgments and orders from which an appeal should lie, but simply to designate the officer with whom the undertaking should be filed. It is the duty of a clerk, after a judgment has been rendered by the court, to enter that judgment in the judgment-book. The draftsman of section 286 assumed that clerks would do their duty, and used the phrase quoted as the most convenient one to designate the officer with whom the undertaking should be deposited.

The court did not fail to observe the fifth point made by counsel for respondent in his original brief. Our views on that point are not very fully expressed in the original opinion, and we will now endeavor so to express them as to make a rule of practice for the future.

The plaintiff filed an insufficient complaint; the defendant, instead of demurring (which would have been the proper and legitimate practice), answered the complaint, and so answered it as to induce the plaintiff to believe that there was merely an issue of fact between the parties. When the case was called for trial, the defendant objected to the plaintiff's introducing *any evidence* because the complaint did not state facts sufficient to constitute a cause of action.

This was not in the nature of a demurrer to the evidence offered because of its insufficiency to support the complaint, but was in effect a demurrer to the complaint, improperly and irregularly interposed. It should have been filed in writing, and before, or at the time of filing the answer, if, indeed, it was proper to file any answer before the demurrer was disposed of. This demurrer to the complaint (for we can consider it as nothing else) was sustained. Upon the sustaining of a demurrer to a complaint, there can be no doubt what is the proper practice, and that is for the court to give time to the plaintiff to amend. This practice should undoubtedly be pursued in all cases except where the facts stated in the complaint show that the plaintiff has mistaken

Opinion of Beatty, J., on petition for rehearing.

the law; that he has no cause of complaint, and upon his own showing, the facts are such that he cannot so [*161] amend his complaint as to give him a cause of action. This is not a case of that sort. We can readily see how the complaint might be amended so as to make it a good one. Had the demurrer been regularly interposed, we have no doubt the court would, in sustaining it, have given plaintiff time to amend, instead of entering final judgment. But the court and counsel for plaintiff both seem to have been surprised by the irregular manner of bringing up this demurrer. Under the effects of that surprise, the court made an improvident order for final judgment. The counsel for plaintiff failed for the moment to perceive the proper course for him to take, and omitted to ask leave to amend. The next day, upon recovering from his surprise, he did ask leave to amend, but the court refused to allow the amendment. We think the court should not have made the order for final judgment of nonsuit when it was made; that on the following day, when the plaintiff came in and asked to amend, he should have been allowed to do so, and the judgment of nonsuit should have been set aside. We are of opinion that a party should not be allowed to obtain a greater advantage by irregular and improper practice, than he would have acquired by the regular and legitimate course pointed out by the practice act.

Rehearing denied.

DECISIONS
OF
THE SUPREME COURT
OF THE
STATE OF NEVADA.

APRIL TERM, 1865.

E. R. COX *v.* T. G. SMITH ET AL., BOTH PARTIES AP-
PEALING.

[1 NEVADA, 161.]

CONTRACTS—COMPOUND INTEREST CANNOT BE ENFORCED.—It is a settled rule in courts of equity that a contract for future compound interest will not be enforced. Our statute does not sanction compound interest. Contracts, therefore, in regard to compound interest, must stand or fall by the established rules of equity and common law courts.

CONTRACTS—VALID CONSIDERATION.—If A. borrows fifteen hundred dollars in gold from B. when that gold would be worth twenty-five hundred dollars in government paper currency, and gives his note for twenty-five hundred dollars, the note is a valid note with sufficient consideration.

NOTE BEARS INTEREST AFTER MATURITY.—When a note is made payable at a given day, with interest at the rate of six per cent. per month until paid, it continues to draw six per cent. interest after maturity and after judgment.

MORTGAGE—REASONABLE COUNSEL FEES.—The mortgagor may contract to pay a counsel fee for the expense of enforcing the lien on the [*162] property mortgaged *in case legal proceedings have to be taken. And such contract will be enforced to the extent of allowing a reasonable counsel fee beyond the costs allowed by law.

(1) See 2 Nev. 200.

Opinion of the Court—Beatty, J.

APPEAL from the District Court of the Second Judicial District of the State of Nevada, Ormsby County, Hon. J. H. WRIGHT presiding.

The facts are stated in the opinion.

R. M. Clarke, for Cox.

Alvater & Flandreau, for Smith & Garrett.

[*164] *By the Court, BEATTY, J.:

In August, 1863, Robert Logan and Wellington Stewart executed to plaintiff the following note:

"\$2500. CARSON CITY, NEVADA TERRITORY, August 25, 1863.

"For value received, we, or either of us, promise to pay E. R. Cox or order, in twelve months from date, without grace, the sum of twenty-five hundred dollars (\$2500), with interest thereon at the rate of six (6) per cent. per month, payable monthly in advance, on that day of each [*165] and every month *corresponding with the date of this obligation until paid; and if any part of the interest herein provided shall not be paid when the same becomes due, then the holder hereof may add the same to the principal sum, and it shall thereupon become a part of said principal and bear monthly interest at the same rate, and so on from month to month, adding all interest in arrear to such principal, and compounding interest on interest at the same rate, and making monthly rests on that day of each month, corresponding to the date of this obligation, and in case a cause of action shall accrue on this obligation, and the payee or holder hereof shall commence a suit to enforce the same, then it shall be lawful for the said payee or the holder hereof to have and demand upon the same ten (10) per cent. upon the amount which shall be recovered thereof as a reasonable indemnity for attorney and counsel fees, in addition to the taxable costs of suit, and in case of judgment or decree, said percentage shall be included therein and bear interest at the same rate and in the same manner as the principal debt.

"ROBERT LOGAN,
"WELL. STEWART."

Opinion of the Court—Beatty, J.

This note was secured by a mortgage on certain real estate. In March, 1864, Wellington Stewart executed several notes to Robert Logan, and to secure the payment of the same executed a mortgage on certain real and personal property.

The most valuable part of the property embraced in the mortgage from Stewart to Logan was also embraced in the joint mortgage of Stewart and Logan to Cox; so that Logan, as to the principal part of his security, stood in the position of second mortgagee. Logan assigned his notes and mortgage to J. E. Garrett and T. G. Smith.

The property mortgaged is insufficient to pay all the incumbrances, and the controversy in the case is between the first mortgagee, E. R. Cox, and Garrett & Smith, who are the successors in interest to the second mortgagee. When Cox took the note which is set out in the beginning of this opinion, he advanced or loaned to Stewart and Logan only fifteen hundred dollars in gold coin, but that fifteen hundred dollars was worth, and would have purchased in currency, the sum of *twenty-five hundred dol- [*166] lars. There was a verbal agreement made when the note was executed, that fifteen hundred dollars in gold coin would be accepted if offered in lieu of the twenty-five hundred dollars.

Upon the foreclosure of the mortgage, the parties holding the second mortgage raised these points: First. The plaintiff was not under our statutes entitled to compound interest on his claim. Second. He could only recover the actual amount loaned, fifteen hundred dollars, and interest. Third. The demand after maturity only bore interest at ten per cent. per annum. Fourth. The counsel fee as stipulated in the note was exorbitant, and would not be enforced in a court of equity—but only an allowance of a reasonable counsel fee.

The court below held with the second mortgagees as to the first point, only allowing simple interest. On the other three points the court held with the first mortgagee. Both parties appeal. The plaintiff from that part of the decree adopting *simple* interest as the rule of computation, and

Opinion of the Court—Beatty, J.

refusing *compound* interest; Garrett & Smith from the portions of the decree having reference to the other three points just mentioned. We shall first examine the point raised by plaintiff's appeal.

In the statutes of California, from which ours have generally been copied, two acts are to be found, one entitled "An act in relation to the money of accounts of this State," and the other entitled "An act to regulate the interest of money." In our statutes these two acts have been blended into one act entitled, "An act in relation to money of account and interest."

Sections first, second and third of our act are in the same language precisely as the three sections of the first named California act, with the exception of the word "territory" is substituted for "state" in the first section. The phraseology of both statutes are in some particulars a little peculiar, and it is evident ours was copied from the California act. The fourth section of our act, which fixes the legal rate of interest (in the absence of an express written contract), is identical with the first section of the second named California act, with the exception of two words. Our

statute contains the word "or" in one part of a sentence [*167] where it ought not to be. This is evidently a mistake in the printer or some copyist, but does not in the slightest degree alter or obscure the meaning of the sentence. The word "territory" is substituted for "state." This section is evidently copied from the California statute.

The fifth and last section of the Nevada act is in the following words:

"SEC. 5. Parties may agree in writing for the payment of any rate of interest whatever on money due, or to become due on any contract. Any judgment rendered on such contract shall conform thereto, and shall bear the interest agreed upon by the parties, and which shall be specified in the judgment, provided only the amount of the original claim or demand shall draw interest after judgment."

This fifth section is an exact copy of the second section of the last named California act, down to the proviso. Nothing like the proviso is found in the California act.

Opinion of the Court—Beatty, J.

Whilst our act ends with this proviso to the fifth section (second of the California act), the California act from which it is copied contains a third section which is in these words: "Sec. 3. The parties may in any contract in writing whereby any debt is secured to be paid, agree that if the interest on such debt is not punctually paid it shall become a part of the principal, and thereafter bear the same rate of interest as the principal debt."

The copying of two sections of the California act and omitting the other, indicates that the omission was made *ex industria* and for a purpose. The journals of the legislative assembly show, too, that this third section of the California act was at one stage of the proceedings before that body, embraced in the bill and afterwards stricken out.

To our mind this is conclusive that the legislature did not intend by their action to sanction or encourage compound interest. In the proviso above referred to they expressly prohibit compound interest in judgments.

If we are correct in the foregoing views as to the effect and proper construction of our statute, the only remaining ground on which the plaintiff can claim to support his theory is, that the legislature failing to sanction *compound interest* by express enactment, cannot operate as a prohibition, but leaves the question *just where it [*168] stood at common law. It may not, then, be improper to inquire, what was the rule of common law? We find that there is great contrariety of opinion as to what was the rule of the common law before the statute of 37 of Henry VIII. According to the opinion of some authors all interest on money was usurious and unlawful before that time. On the other hand, Chief Justice Hale held that the common law only prohibited as usurious and unlawful interest which amounted to forty per cent. per annum or more.

On this subject Bacon's Abridgment, title Usury, may be consulted by those who are curious as to the ancient law. Also the opinion of Senator Spencer in the case of *Rens. Glass Factory v. Reid* (5 Cow. 609). Perhaps the discrepancies of opinion on this subject may be accounted for in this way. At an early period in England the chancellors

Opinion of the Court—Beatty, J.

were generally churchmen, and not lawyers. As the catholic church has always set its face against usury, and been disposed to condemn the practice of exacting interest as immoral, and more especially as the Jews at that early date were almost the only money-lenders, it is probable that the chancellors held all interest usurious and illegal; while the common law courts, presided over by lawyers, better acquainted with the commercial necessities of the country and less prejudiced against the Jews, may have held that *reasonable interest* was not unlawful.

It is more profitable, however, to inquire what was the state of the law on this subject, as established by the courts of equity and common law at the time our statute was passed. In Am. L. Cas., vol. 1, 533-4, the principal American cases on the subject of *compound interest* have been cited and commented on.

The general conclusion at which the author arrives is that the "better opinion is that at law such an agreement made either at or after the time of the original contract, will be enforced." In support of this proposition the commentator cites several cases. On the other hand, on the same page a large number of cases are cited holding an opposite doctrine. In chancery this commentator admits the rule has been different, and courts of equity have uniformly discountenanced all attempts to collect compound interest [*169] except in those cases *where the contract to pay the same was made after the simple interest fell due.

So far as the reports referred to were accessible to us we have only found two cases where actions at law have been sustained on a contract for payment of *compound interest*, with the exception of cases where the agreement to pay the compound interest was made after the simple interest became due. One of these cases was *Greenleaf Kellogg* (2 Mass. 568), afterwards overruled in *Hastings Wiswall* (8 Mass. 455), and *Henry v. Flagg* (13 Met. 65). The other case is *Tulliaferro's Ex'r v. King's Adm'r* (9 Dalt. 331).

The New York, English and Massachusetts decisions (except the one overruled case in Massachusetts) seem to *all* the other way.

Opinion of the Court—Beatty, J.

The opinion of Chancellor Kent in 1 John. Ch. 13, against the policy of allowing compound interest is, we think, exhaustive of the subject, and settles conclusively what is the rule of equity.

Then, when the Nevada statute was passed, it was the settled rule of courts of equity to refuse to allow compound interest when their aid was invoked to collect a debt. In courts of law the rule was not so well settled, but we think a majority of the States of this Union, and the English courts of law, had refused to enforce that portion of contracts which provided for the collection of compound interest.

None of these rulings were founded on the statutes against usury, but the general principles of the common law as it existed without reference to the usury law. Our conclusion then is, that the court below did not err in refusing to allow compound interest, and the judgment of that court as to the part thereof appealed from by the plaintiff must be affirmed.

Having disposed of the plaintiff's appeal, we will now consider those portions of the decree from which defendants appeal. The first objection on the part of defendants to the decree is that plaintiff is allowed to recover twenty-five hundred dollars, when he only loaned fifteen hundred dollars. The loan was made in coin, and it is admitted the fifteen hundred dollars would have purchased twenty-five hundred dollars in government currency. If the plaintiff had bought twenty-five *hundred dollars [*170] with his fifteen hundred dollars in gold, and loaned the twenty-five hundred dollars in paper, no one would have claimed that the note for twenty-five hundred dollars was not a valid note, founded on a good and sufficient consideration.

Why, then, is it less adequate when the borrower gets that for which he could have purchased or procured twenty-five hundred dollars? The courts must recognize the fact that there are two kinds of currency of unequal value, and they must presume that a debtor will pay in that kind of currency which is least onerous to himself. Therefore when

Opinion of the Court—Beatty, J.

a man borrows the more valuable kind of currency, and gives his note for a larger sum, payable in dollars, generally the presumption is he intends to pay in those dollars which are least valuable. We can see nothing illegal or immoral in such a transaction. If there is nothing morally wrong in the transaction, on what principle can it be claimed that a part of the note is not recoverable? It cannot be said that such a note is *without* consideration, or that there has been any *failure* of consideration. The party borrowing has received all he expected to receive, all he contracted to receive, and has received that which in value was equal to twenty-five hundred dollars in currency.

The court will presume he did not intend to pay it in a better money than currency, and that it could not be enforced in any other kind of money.

We therefore hold that the court below ruled correctly allowing the plaintiff to recover to the amount of twenty-five hundred dollars and interest.

Before leaving this branch of the case we will say, question as to the constitutionality of the act of Congress making treasury notes a legal tender for debts was raised.

We therefore have not examined that question in connection with the subject, but assumed the law to be constitutional.

But even if it were otherwise, we cannot see that it would vary our decision on this point. If we had a uniform metallic currency, and a borrower were, on the receipt of fifty hundred dollars, to give his note for twenty-five hundred dollars, payable one month after date, we do not [*171] see on what principle the court could relieve him from the note, if there was no fraud, or mistake, or imposition in the transaction.

The next ground of complaint on the part of defendant is, that the plaintiff is allowed to recover six per cent. per month on his demand after the note fell due. It is contended that our statute only allows parties to contract stipulated rates of interest during such time as the contract is unbroken. That upon the breach of the contract the law steps in and fixes arbitrarily what shall be the measure

damages for the breach of the contract, and that measure is interest at the rate of ten per cent. per annum. The rule is well established, that in actions for the breach of a contract for the payment of money, the measure of damages shall be the legal interest on the money for the time it is withheld, and no special damage can be proven or shown. But what is the legal rate of interest under our statute? If the contract is in writing, whatever rate of interest is established by that contract is the *legal rate* so far as that controversy is concerned.

The law allows the parties themselves, by due formalities, to fix the legal rate. The law provides that when the judgment is entered up, the debt shall bear that rate of interest which the parties have contracted shall be the legal rate for that particular transaction. It is what the parties have agreed is the value of the use of the money before breach. It is the interest or damages which the law gives after judgment. It would be strange if, between breach and judgment, the measure of interest or damages should be different.

It seems to us the intention of the legislature was clear that parties might contract for any rate of simple interest (but not compound), and that interest should continue to run on the principal sum until paid.

The parties have contracted it should so run in this case, and we can see no principle of law upon which they can escape their contract. The principle claimed is that they can escape the consequences of a contract (which the law allows them to make) by refusing to comply, and throwing obstacles in the way of a prompt judgment. No doubt the law might prohibit the collection of a greater rate of interest than ten per cent. on a debt past due. But we think the Nevada legislature *neither did nor intend [*172] anything of the kind. Upon this point we think the judgment of the court below correct.

The only remaining question is as to the allowance of five hundred and five dollars for counsel fee. On this point we feel some embarrassment in coming to a conclusion. We are satisfied that the amount is more than a reasonable fee for the foreclosure of the mortgage. But the amount is

Opinion of the Court—Beatty, J.

clearly fixed by the agreement of the parties, and we cannot say it is so unreasonably large, so extravagant in amount as to induce a court of chancery to disregard the plain meaning and intent of the parties. We doubt extremely the policy of enforcing any contract whereby the mortgagor makes himself responsible for counsel fees.

We think it has a tendency to encourage extortionate and oppressive contracts, and is at war with the best interests of society. But all the cases we find reported on this subject hold that a reasonable counsel fee may be contract for in such cases, and a court of equity will enforce the agreement.

In all the cases called to our attention in which this point has arisen, the courts have allowed the counsel fee charged but have generally used some expression indicating that the charges allowed were reasonable, and that if unreasonable counsel fees were allowed, the court would interfere by its authority to protect the mortgagor.

No rules, however, as to what are reasonable fees and what are not, are established. All that is said about reasonable fees, amounts to mere dicta or surmises.

In this case the counsel fee is certainly very liberal, say the least of it, but not more extravagant than the amount of interest contracted for. Not finding any adjudicated cases authorizing such interference, and the amount being so extravagant as to show that it was intended as a penalty to be held in terrorem over the mortgagor, the court will not interfere with the judgment of the court below.

The judgment of the court below is in all things affirmed. Each party will pay their own costs.

THE PEOPLE, RESPONDENT, v. THOMAS L. GLEASON,
APPELLANT.

[1 NEVADA, 173.]

BILL OF EXCEPTIONS—HOW SIGNED.—Bills of exception must be signed by the judge who tried the cause.

¹INSTRUCTIONS PART OF THE RECORD.—Instructions which are filed with the indorsement of the judge are a part of the record, and the action of the court thereon may be reviewed without any formal bill of exceptions.

²INSTRUCTION—GOOD CHARACTER OF DEFENDANT.—An instruction that “the good character of the defendant can only be taken into consideration when the jury have a reasonable doubt as to whether the defendant is the person who committed the offense with which he is charged:” *Held*, correct.

IDEM—INVOLUNTARY MANSLAUGHTER.—It was not error in the court below, after defining involuntary manslaughter, to add: “The drawing of a deadly weapon, in a rude, angry and threatening manner, not in necessary self-defense, is an unlawful act within the meaning of our statute.”

IDEM—VENUE MUST BE PROVEN.—To convict one on trial for murder, it is necessary not only to prove the prisoner committed the offense charged, but committed it within the territorial jurisdiction of the court and grand jury where the indictment is found. The defendant, under all circumstances, is entitled to an instruction embodying this principle of law.

GOOD CHARACTER—MOTIVE.—In a trial for murder, the good character of the defendant may be proved to explain the motive when the fact of the killing is not denied.

APPEAL from the District Court of the Third Judicial District of the Territory of Nevada, Lander County, Hon. P. B. LOCKE presiding.

The facts are stated in the opinion.

Garber & Hupp, for Appellant.

Geo. A. Nourse, Attorney-General, for Respondent.

*By the Court, BEATTY, J.: [175]

This was an indictment for murder, tried in Lander county about one year since, and recently appealed to this court.

Several points are raised by the appellant, and a bill of

Opinion of the Court—Beatty, J.

exceptions in the case is referred to in support or explanation of each of the points.

What counsel refer to as a bill of exceptions cannot be recognized as such by this court.

A bill of exceptions is a statement in writing of something which occurs during the progress of a cause, which to become a part of the record, must be settled and signed by the judge. We cannot conceive that anything can be treated as a bill of exceptions which has not received the sanction of the court.

The judge's signature is absolutely indispensable. What purports to be a bill of exceptions here is signed by counsel for the prisoner and John V. Watson, late deputy district attorney for Lander county.

The case seems to have been tried in the court below by the part of the people by a Mr. Jones, prosecuting attorney. Why the signature of Mr. Watson appears on this paper is not aware. Whether he intended by signing the paper to acknowledge service thereof, or to admit that the statements therein contained were true, we are unable to say. But in either event we cannot accept the signature of Watson in lieu of the judge's.

The statute is imperative that the bill of exceptions must be signed by the judge. (See section 423 of the criminal procedure act.) Section 426 in the same act provides that instructions given and refused need not be excepted to, or embodied in any bill of exceptions, but shall be filed with an endorsement thereon of the action of the court in giving or refusing the same, and become a part of the record. It also provides that on appeal the action of the court on these instructions may be reviewed.

Whilst, therefore, we cannot pass on all the points raised by appellant, there are several upon which we must pass.

The first point raised is, that the court erred in giving this instruction:

[*176] "The good character of the defendant cannot be taken into consideration when the jury has no reasonable doubt as to whether the defendant is the person who committed the offense with which he is charged."

Opinion of the Court--Beatty, J.

There are two points of objection made to this instruction. The first is, that the jury being instructed in substance that the good character of the defendant can only be taken into consideration when they have a reasonable doubt of his guilt, is equivalent to saying, you can only consider the good character of the defendant when the evidence, *exclusive of that in regard to character*, leaves such a reasonable doubt on your minds as will entitle the defendant to an acquittal.

We do not think that is the proper construction to put on that sentence.

In our estimation it rather means to inform the jury that however good a man's character may be, that alone will not entitle him to an acquittal.

That they can only acquit when a due consideration of all the testimony in the case, including that in regard to defendant's character, either convinces them that defendant is innocent, or raises in their minds a reasonable doubt of his guilt. The next objection is, that the court concludes the sentence in these words: "As to whether the defendant is the person who committed the offense," etc.

The complaint as to this part of the instruction is, that under the proof and character of the defense in this case, there was no question as to the person who committed the offense, if any was committed; the only question was as to the character of the offense; whether the killing of deceased was accidental or intentional, and if criminal, what was the grade of crime committed?

It is contended that the defendant's character as a peaceable and quiet citizen, should have been considered by the jury in coming to a conclusion as to whether the shot fired was the result of intention or mere accident.

There is some conflict of authorities as to whether proof of a defendant's character can be produced under an indictment for murder to explain the motives of the killing, where the killing itself is not denied. We think that reason and justice *alike require that a defendant, with [*177] an established character as a peaceful, quiet and law-abiding citizen, should have the benefit of that charac-

Opinion of the Court—Beatty, J.

ter, and all reasonable inferences to be drawn therefrom when he is called on in a court of justice to account for the killing of a human being.

But in this case the authenticated record does not disclose the circumstances of the case, the nature of the proof introduced, or the character of the defense. We therefore cannot say this was error. The next instruction complained of is one in which the court, after defining involuntary manslaughter, adds:

“The drawing of a deadly weapon in a rude, angry and threatening manner, not in necessary self-defense, is an unlawful act within the meaning of our statute.”

It is not contended that the definition of involuntary manslaughter, as contained in the instruction, is not correct, nor is it contended that the sentence we have quoted contains anything which is not law, but that the addition of the latter sentence to the definition of the crime was calculated to prejudice and mislead the jury; that it was equivalent to an intimation of opinion by the court that a drawing of a pistol in a rude, angry and threatening manner, not in self-defense, was by statute the commission of an unlawful act, which in its consequences tends to destroy life, etc. We think no such inference could be drawn from the instruction. The only inference we think to be drawn from the instruction is, that the court thought such an act would be unlawful. We see no intimation that it would be not only unlawful, but of a character to endanger human life. If there was proof in the case that defendant had drawn a pistol in a rude, angry and threatening manner, that a pistol had been discharged and a homicide committed, it was eminently proper to give that instruction to the jury. The commission of a homicide while in the performance of an unlawful act, is some offense against the law, and is one in which a defendant may be found guilty under an indictment for murder. Therefore the instruction was proper. The jury paying due regard to this instruction might find that the act of drawing the pistol under all the circumstances proved was a lawful act, simply an unlawful act
[*178] *or that it was an unlawful act tending to destr

Opinion of the Court--Beatty, J.

human life. In the latter case, finding the prisoner guilty of murder; otherwise of a lower grade of offense, or not guilty.

The next error complained of in regard to instructions is, that the court refused to give the following instructions:

"Counsel for the defendant ask the court to instruct the jury, that in order to convict the defendant in this case, it is necessary for the people to prove that the alleged offense was committed within the limits of Lander county, and that unless they believe from the testimony that such alleged offense was committed in said county, they must find the defendant not guilty."

It is well settled that the allegation of venue in a criminal case is a material allegation and must be proved. A grand jury of Lander county can have no jurisdiction of a case in Storey county. If a prosecuting attorney submits his case to a jury, without having proved the offense was committed in the county where it is alleged to have been, we cannot see anything for the jury to do but to acquit.

Before a conviction can be had in any case three propositions must be affirmatively made out by the prosecution. First. That the offense charged in the indictment has been committed. Second. That it was committed within the territorial jurisdiction of the court and grand jury where the indictment was found. Third. That the party on trial was the offender.

A failure to introduce satisfactory evidence on either of these points, before the case is finally submitted to the jury, is fatal to the prosecution.

We express no opinion here as to what should be the proper practice in case the court discovers, before the case is finally submitted to the jury, that there has been an oversight or omission in failing to prove where the offense was committed, but merely what must be the effect of submission without such proof.

This being the well-settled law, we see no reason why this instruction was refused. The phraseology seems to be unexceptional. There is no other instruction covering the same ground, and no apparent reason why it should not

Points decided.

have been given. If the venue was proved satisfactorily, the instruction would *do no harm. If it was not proved clearly and beyond all doubt, the defendant had a right to argue the point to the jury of the sufficiency of the proof, and have it passed on by them.

In no case should the court have assumed to judge of the sufficiency or insufficiency. If, in this case, the proof of venue was circumstantial, and not positive—in other words, if the proof of the offense having been committed in Land county was sufficiently shown by a number of facts proven in the case, whilst no witness said in so many words that it was in Land county, and the court was afraid the instruction asked would mislead the jury into the belief that venue must be proved by direct and not circumstantial evidence, the instruction asked should have been given; and further instructions given that venue, like anything else, might be proved by circumstantial evidence.

The simple refusal of this instruction seems to us to have been error, and however reluctant we may be to reverse cases on mere technicalities, which probably had nothing to do with the real merits of the case, we cannot, without a violation of all legal principles, refuse relief in such cases as this.

The judgment of the court below must be set aside, and a new trial granted.

JACOB HYMAN ET AL., APPELLANTS, v. J. W. KELLY ET AL., RESPONDENTS.

[1 NEVADA, 179.]

FORECLOSURE OF MORTGAGE—WHEN A RECEIVER SHOULD BE APPOINTED.—Inadequacy of property to satisfy lien; insolvency of mortgagor; specific pledge of rents and profits, to keep down interest, which were afterwards diverted; permissive waste of property by defendants and threat of one of the defendants to destroy the property, constitute sufficient reasons for appointing a receiver.

AGREEMENT—WHEN NOT VOID FOR UNCERTAINTY.—An agreement describing sufficiently the parties thereto, the property to be affected thereby, and providing that one party shall, *in præsentia*, enter into possession of the property described, and hold it until a certain debt is paid out of the rents and profits of the property, is not void for uncertainty.

Opinion of the Court—Beatty, J.

A SEAL IMPORTS CONSIDERATION.

***TRUSTEES—DUTY TO PROTECT PROPERTY.**—If a trustee turns over the [*180] trust property to the custody of one who neglects to care for it properly, a court of equity will interfere to protect the property from waste.

FORECLOSURE AND SALE—REMEDY OF MORTGAGEE.—Under the statutes of this State the mortgagee has but the one remedy of foreclosure and sale; but the statute does not deprive the mortgagee of any portion of the relief which is usually granted in foreclosure suits where the sale of the property is sought.

RECEIVERS, WHEN WILL BE APPOINTED.—Receivers will be appointed in foreclosure suits where it is necessary to prevent fraud, injustice or loss of security.

APPEAL from the District Court of the First Judicial District of the State of Nevada, Storey County, Hon. RICHARD RISING presiding.

The facts of the case are stated in the opinion of the court.

Quint & Hardy, for Appellants.

Taylor & Campbell, for Respondents.

*By the Court, BEATTY, J.:

[*181]

In June, 1863, J. W. Kelly, being the owner of certain city property in Virginia, Storey county, he and Bridget Kelly executed a mortgage thereon to John Kelly. In August, 1863, they executed a second mortgage on the same property to H. Myers and Israel Solomon. In September, 1863, J. W. Kelly entered into a written contract under seal with Myers, one of the second mortgagees, by the provisions of which Myers was to enter into possession of the mortgaged premises, lease them and collect the rents, and apply them as provided for *under the contract. [*182] Among other applications of the rent, one was to keep down the interest on the mortgage in favor of Myers and Solomon. It also provides for the payment of insurance, improvements on the property, etc., and further provides that the possession of Myers shall continue until the payment, not only of the mortgage to himself and Solomon, but also of the Kelly mortgage, which is recited to have

Opinion of the Court—Beatty, J.

been assigned to them. Myers entered into possession under this contract, and for a time collected the rents and applied the proceeds in accordance with the provisions of the contract. He then assigned his interest in both contracts to Hyman & Lichtenstein. After the assignment, Myers ceased to collect the rents or have any control over the property. The present plaintiffs took his position in that respect for a while, and then J. W. and Bridget Kelly induced tenants who had been put in possession by Myers and the present plaintiffs to surrender the possession to them, since that time no rents or profits have been applied in keeping down the interest on the second mortgage, or in either of the mortgages. The Kellys have received the rents and profits, failed to pay the taxes, neglected to keep the building in repair, and one of them even threatened to destroy them if deprived of the possession.

Plaintiffs filed their bill of foreclosure, obtained a decree, and had the property sold. They bid it in at sheriff's sale for less than the amount of their debt, but for considerably more than its real value.

The Kellys and their tenants are utterly insolvent and irresponsible. The house is going to waste and becoming untenable for want of repairs. Such are the facts of the case as charged in the bill filed, and upon this state of facts the plaintiffs ask for a receiver to be appointed to collect the rents, preserve the property, etc., during the six months which intervenes between the sale and the time when the purchaser is entitled to his deed and possession of the premises bought. Defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer and dismissed the bill.

The demurrer of course confesses the truth of [*183] allegations in the bill, and the question for the court to decide is whether the court erred in sustaining the demurrer and dismissing the bill.

We will first examine what was the equity rule as it formerly existed in the English and American courts, and we will see what changes, if any, have been made in the rule by our code of procedure.

Opinion of the Court—Beatty, J.

Courts of equity, upon the filing of a bill to foreclose a mortgage, have usually appointed a receiver where there was an allegation that the property mortgaged was insufficient to pay the mortgage debt, and the mortgagor was insolvent. If in addition to this it appears there was a specific pledge of the rents and profits, to keep down the interest, and they were being diverted, it always furnished a strong additional reason for the appointment of a receiver.

In this case many equitable circumstances exist which would bring it within the rules established by courts of equity for granting receivers.

First. The property is entirely inadequate to pay the debt.

Second. The mortgagors are insolvent.

Third. There was not only a contract that the rents should repair the building and keep down the interest, but Myers was actually put in possession of the property and rents and profits, and for a time they were so applied.

Fourth. The defendants, by a fraudulent collusion with the tenants put in possession by Myers or the plaintiffs, effected a change in the condition of the property and diverted the rents from their legitimate channel.

Fifth. The defendants are guilty of permissive waste.

Sixth. One of them is threatening to destroy the property.

It appears to us the existence of these facts would be sufficient, according to the established practice in all courts of equity, to induce the court to appoint a receiver. Even if one-half of the facts here alleged were true it would seem to us sufficient to justify a court of equity in granting the relief sought.

For the rules governing courts of equity in the appointment of receivers, we would refer to Dan. Ch. Pr. 1950 to 1958; *Bank of Ogdensburg v. Arnold*, 5 Paige, 38; *Howell v. Ripley*, 10 Paige, 43; *Astory v. Turner & Skulmore*, *11 Paige, 436; *Lofsky v. Majer*, 3 Sandf. Ch. 71. [*184]

Respondents contend that the contract with Myers cannot be relied on to aid the plaintiffs' case for several reasons, which we will presently notice. We might say that

Opinion of the Court—Beatty, J.

plaintiffs make a case sufficiently strong for equitable interference without that instrument, but we take a different view of the matter.

Counsel say of this instrument, "If intended for a lease it is void for uncertainty." We cannot see any such uncertainty about it.

We know not in what particular counsel considers it uncertain.

The parties to the lease and the property seem sufficiently certain; it purports to commence *in præsenti*, and to continue until the extinguishment of the debts secured by mortgage.

It might be somewhat problematical if the rents in this case ever would extinguish the mortgages, but that is no such uncertainty as would invalidate a lease or grant.

"If a contract, it was void for want of consideration," say counsel for respondents. The seal certainly imports consideration. There is nothing in the case that contradicts the legal presumption of consideration arising from the character of the instrument.

That instrument, in our opinion, did convey to Myers present subsisting interest in, and right to possess and control the property described. But that possession was right not to be enjoyed for his own benefit, but he stood in the light of a trustee to rent out the premises for the mutual advantage and benefit of the mortgagors and mortgagees and account for the rents and profits as specified in the agreement. If Myers neglected his duty as trustee, and turned over the property to the care of others, who were not managing it properly, no doubt on application to a court of chancery by the present defendants the court would have appointed a receiver to manage the property and collect the rents; but no default of Myers could justify the course pursued by defendants.

The next question to be considered is, has our practice act altered or curtailed the power of equity courts [*185] in granting relief in foreclosure suits? To settle this point properly, it may be necessary to recur to the former practice of courts of law and equity in mortgage cases.

Opinion of the Court, Beatty, J.

At common law it has always been held that the title of the estate vested in the mortgagee upon the execution of the mortgage, and on the failure to pay the debt at maturity the mortgagee might at the very same moment commence an action of ejectment for the possession of the land, an action of debt or assumpsit for the debt, and file a bill in equity to foreclose the right of redemption.

Our practice act contains only two sections which, in our opinion, bear on this point. These are sections 246 and 260, which read as follows:

"SEC. 246. There shall be but one action for the recovery of debt, or the enforcement of any right secured by mortgage, or lien upon real estate, or personal property, which shall be for an enforcement of said lien or mortgage, in accordance with the provisions of this chapter. In such action the court shall have power before judgment, or decree, to direct a sale of the incumbered property, or such part thereof as shall be necessary, and the application of the proceeds to the payment of the costs and expenses of the sale, the costs of the suit, and the amount due to the plaintiff. If it shall appear from the sheriff's returns that there is a deficiency of such proceeds and a balance still due to the plaintiff, the judgment shall be docketed for such balance, and shall, from the time of such docketing, be a lien upon the real estate of the judgment debtor, and an execution may be issued by the clerk of the court, as on other judgments against the property of the judgment debtor, to collect such balance or deficiency.

"SEC. 260. A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale."

The only construction we can put on these two sections is that the mortgagee shall pursue but one remedy, not two or three remedies at the same time, for the enforcement of his rights. And that remedy shall in no case be the action of ejectment to obtain the possession of the land. [*186] But the remedy shall be the equitable one of foreclosure and sale, if the mortgage is relied on. Perhaps, if

the mortgagee chooses to abandon all claim under the mortgage, he may bring the ordinary suit for the collection of debt. But supposing the remedy to be sought not or against the debtor but against the property mortgaged, is strictly confined to that remedy in equity which is called (perhaps rather inaccurately) a foreclosure and sale. In England, and perhaps in some of the older States of the Union, there was a common practice of filing a bill praying the court to compel the mortgagor to redeem or to yield and relinquish his right of redemption. In such case the form of the decree is that the mortgagor redeem by paying the amount due to the mortgagee by a day certain, or will be forever barred of his right to redemption. This is what may be termed a strict technical foreclosure. Though in reality the mortgagee had three distinct remedies which he wished to reach the mortgaged property:

First. Ejectment at law.

Second. Strict technical foreclosure in equity.

Third. The equitable remedy of foreclosure and sale.

Our statute clearly restricts the mortgagee to the last named remedy. But in restricting him to this remedy, does it deprive him of any portion of the relief which is usually granted by courts of equity where this remedy is sought? If it does, we are unable to see how or why it is done. We are aware that the supreme court of California, in the case of *Guy v. Ide*, 6 Cal. 99, held that, under a statute precisely like ours, it was not a proper practice to appoint receivers pending a foreclosure suit.

The learned judge who rendered the opinion in that case says: "Our statute forbids a mortgagee from recovering the mortgaged estate, and confines his remedy to a foreclosure. The same reason does not, therefore, exist, as the English rule for appointing a receiver to collect the rents and profits pending the litigation." This reasoning is, to our minds, incomprehensible. The argument "Our law having forbid the mortgagee to bring ejectment for the property mortgaged, it therefore becomes the duty of equity courts to deny him all security to be received from the rents and profits, and *all opp

tunity of protecting the property during litigation." If it be taken for granted that it was the object of our legislature, in framing this part of the practice act, to discourage mortgages, and to render such securities uncertain and comparatively valueless, then we could understand this reasoning. But if the intention was merely to simplify proceedings in courts of justice and prevent multiplicity of suits, then we cannot understand or appreciate the force of this argument.

The legislature having forbid the mortgagee pursuing the common law remedy of ejectment, would, it appears to us, be rather a reason for a more liberal exercise of the chancellor's powers to protect the security he has for his debt.

Whilst, perhaps, the English practice of appointing a receiver, almost as a matter of course, when a bill is filed by the first mortgagee, would not have a good practicable operation in our country, owing to the great cost attending such appointments, and the miserable mismanagement of estates generally by such appointees, still we think there are many cases where such an appointment is necessary to prevent fraud and injustice and loss of security.

If the principle be once established that courts will not, in foreclosure suits, appoint receivers, all a fraudulent mortgagor has to do to keep possession of property for months after it ought to be sold to pay the debt, is to make a conveyance to some non-resident who cannot be served with process for months. In the meantime he can use up and destroy the improvements and render the security valueless.

In this case the demurrer should have been overruled.

The relief sought in the bill should be granted, unless the defendants can show a state of facts far different from those stated in the complaint.

The judgment of the court below is reversed. That court will enter an order overruling the demurrer interposed by the defendants, and take such further proceedings as the equity of the case may require, not inconsistent with this opinion.

Points decided.

BROSNAN, J., concurring:

I concur in the judgment of reversal, owing to the manifest equities in this particular case; and especially [*188] for the reason *that the rents of the mortgaged premises were by express contract pledged to the payment *pro tanto* of the mortgage debt even before it became due and payable.

But from so much of the opinion as holds that a receiver may properly be appointed in a case of foreclosure of a mortgage upon commencement of the action, I respectfully dissent.

Under our statute the estate remains in the mortgagor as owner until divested by foreclosure, and of course must continue so, with all the incidents of ownership, until a new owner is invested with title under the sale.

J. H. MALLET, RESPONDENT, v. THE UNCLE SAM GOLD AND SILVER MINING CO., APPELLANT.

[1 NEVADA, 188.]

- 1 OFFICER DE FACTO, WHAT CONSTITUTES.—A person appointed justice of the peace by the selectmen of the county of Carson, who had no power to make such appointment, and commissioned by the governor of the territory of Utah, who was authorized to issue commissions to persons elected to such offices, and having discharged the duties of such office and been generally recognized as a justice of the peace, is a *de facto* officer, and his acts are valid as to third persons.
- 2 IDEM.—An officer *de facto* is distinguished on the one hand from a usurper of an office, and on the other from an officer *de jure*.
- 3 JURISDICTION OF JUSTICE OF THE PEACE MUST BE AFFIRMATIVELY SHOWN.—When any rights are claimed by virtue of a judgment of a court of special and limited jurisdiction, all the facts necessary to confer jurisdiction must be affirmatively shown.
- 4 IDEM.—SUMMONS, WHERE SERVED.—Where a judgment of a justice of the peace, whose jurisdiction was limited to a certain county, is offered in evidence to establish rights acquired under it, and where it appears that such judgment was taken by default, it is necessary to show affirmatively that the summons was served on the defendant within the territorial jurisdiction of the justice before it can be introduced in evidence.

(1) 5 Nev. 245; 9 Nev. 326.
(2) 9 Nev. 326.

(3) 1 Nev. 82; 1 Nev. 327; 2 Nev. 109; 5 Nev. 90.
(4) 10 Nev. 370.

Points decided.

EJECTMENT—WHAT DEFENDANT MAY SHOW.—It is competent for a defendant in ejectment to show as a defense that prior to the bringing of the action the plaintiff had conveyed away his title to the premises, or that his grantor had done so prior to the conveyance by which plaintiff claims.

IDEM.—A mere naked trespasser cannot show outstanding title in a third party, except as a means of showing the want of all title or right of possession in the plaintiff.

MINING LAWS—FORFEITURE.—The mining laws of the locality govern the location and manner of developing the mines, and when they directly point out how such mining claims must be located, and how the possession once acquired is to be maintained, that course must be strictly pursued. A failure to do so might work a forfeiture of the ground.

MINING LAWS AND CUSTOMS—TITLE TO MINING CLAIMS.—When the courts presume title in the first appropriator, it can only be a title subject to the conditions imposed by the mining laws and customs, under and by virtue of which it was acquired.

IDEM.—Where no mining laws exist, the miner locating a claim would hold only by actual occupancy, and by such work for the development of the mine as would, under "all the circumstances, be [*189] deemed reasonable, and his right of possession would only be continued by occupancy and use.

IDEM—ABANDONMENT.—There can be no strict abandonment of property without the intention to do so. The bare lapse of time, short of the statute of limitations and unaccompanied by other circumstances, would be no evidence of abandonment.

MINING CLAIMS—POSSESSION OF TENANT IN COMMON.—The possession of one partner or tenant in common inures to the benefit of all, until such possession become adverse.

IDEM—EXPENSES—COURT OF EQUITY.—If one partner or tenant in common, after having become associated with his co-partners in the development of a claim, voluntarily leave it in the possession of his co-tenants, and refuses to bear his just proportion of the expenses incurred by them in the development of it, and should afterwards bring his action to recover his interest, upon a proper showing to the equity side of the court, relief would be refused until he had paid his full proportion of the expenses incurred in such development.

APPEAL from the First Judicial District of the State of Nevada, Storey County, Hon. RICHARD RISING presiding.

The facts appear in the opinion of the court.

Thomas Sunderland, Quint & Hardy and J. H. Harmon,
for Appellant.

J. S. Pitzer and C. J. Lansing, for Respondents.

Opinion of the Court—Lewis, C. J.

[*194] *By the Court, LEWIS, C. J.:

This action is brought is to recover one hundred feet, undivided, in that certain mining ground located in the county of Storey, and now occupied and claimed by the defendants, the Uncle Sam and Baltic Gold and Silver Mining Companies. The plaintiff alleges in his complaint that on the 16th day of November, A. D. 1863, he was the owner as tenant in common, in the possession and entitled to the possession of one hundred feet, undivided, in the Uncle Sam and Baltic Gold and Silver Mining Companies; that said claim at the time of its location was three thousand feet in extent; that after the location thereof by the grantors of plaintiff and others, it was divided between the two companies, defendants in this action, the Uncle Sam taking the north twelve hundred feet and the Baltic taking the south eighteen hundred feet; that plaintiff, his grantors and co-owners in said claim, owned and were possessed thereof, by virtue of their location and appropriation of the same on the 12th day of March, A. D. 1860; that he by himself and his grantors remained in possession of said undivided one hundred feet of ground as tenants in common with his co-owners until the ouster complained of. It is further alleged that on the 16th day of November, A. D. 1863, the defendants, by their agents, servants, and employees, wrongfully and unlawfully entered upon said claim and ousted plaintiff therefrom, and that they unlawfully and wrongfully withhold the same from him. The answer specifically denies each and every allegation of the complaint, but admits that defendants are in possession of the premises, alleging title and right of possession in themselves, and that neither the plaintiff nor his grantors have been seized or possessed of the premises

within two years next preceding the commencement
[*195] of this *action; and that they and those under whom they claim title have been in the quiet and peaceable possession thereof for more than two years before the bringing this suit; that long before the commencement of this action plaintiff and his grantors abandoned whatever right, title and interest he or they may have had in the claim

Opinion of the Court—Lewis, C. J.

The facts, outside of the pleadings, as developed by the record, are substantially as follows:

In March, A. D. 1860, the mining claim now occupied by the defendants was located by Charles Phillippi, Petro Anisini and thirteen others; that these persons, or some of them, occupied and worked the claims thus located up to the first day of March, A. D. 1861, at which time the entire claims were sold under execution issued out of a justice's court against the owners thereof, to one H. W. Johnson, to whom a constable making the sale executed a deed of the claims so sold, and placed him in the possession of the claim. A large number of the claimants thus ejected, accepted of an offer made by Johnson, redeemed their respective interests, and were admitted to all their rights in the claim with him. From Johnson and those persons who thus redeemed their interests the present defendants derive their title. Phillippi and Anisini, the defendants from whom the plaintiff claims his title, did not redeem their interests; whether they offered to do so or not, is of no consequence in this action, if the view we take of the facts and rights and liabilities be correct.

In the trial, the defendants, for the purpose of showing their right of possession in themselves, offered in evidence the complaint, summons, return, judgment, execution, deed of the sale, and the constable's deed by which the defendants became possessed of the claim; the docket of the case in which the judgment was rendered was also offered in evidence for the purpose of showing the proceedings had in the case against Phillippi and others, and in which the judgment was rendered. To all of which the plaintiff's counsel objected, urging various reasons in support of the objection, the most material of which are: That the return of the officer does not show that the defendants in that action were served with the writ within the jurisdiction of the justice, and that the justice rendering the judgment and constable [*196] who executed the process were neither officers *de facto* nor *de jure*, and that, therefore, the judgment is void, and the defendants could therefore obtain no right under it. We deem it necessary to notice any of the other objections proposed.

The court below ruled out all the proceedings had before the justice, together with the constable's deed to Job upon the ground that the judgment was a nullity, and therefore the defendants acquired no rights under it.

The defendants then offered in evidence several from Phillippi to McMahon, Swift, and others, conveying all his interest in the Uncle Sam Company, and all back date prior to the time of the execution of this deed to Small, the grantor of plaintiff, for the purpose of showing that at the time of the making of his deed to Small, Phillippi had no interest whatever in the ground in controversy, and that Small, and the plaintiff Mallet, received nothing by conveyance. The books of the old Uncle Sam Company were also offered for the same purpose, all of which were admitted by the court below, but were afterwards stricken out and the jury instructed to disregard them, for the reason as it appears by the instructions of the court, that the defendants being mere naked trespassers were not in a position to show outstanding title to defeat plaintiff's claims.

These rulings of the court—the giving of the instructions asked by plaintiff, and refusal to give instructions asked by the defendants—are assigned as error by appellants; and as a record in this case presents numerous questions involving other cases against the same defendants, it will perhaps be a matter of utility to pass upon all such as may be deemed of importance in the determination of the others.

The first question presented for our consideration is that raised upon the ruling of the court in rejecting the deed of the justice and the proceedings had before him. It appears from the testimony that Smith, the justice, and Robinson the constable, were not regularly elected to their respective positions, but were appointed by the selectmen of the county of Carson, and received their commissions from the county clerk. It is conceded that the appointment by the selectmen was an assumption of power not warranted by the statutes of Utah; but it is claimed that, having been commissioned by the power authorized to issue commissions to such officers, and they having acted in their respective capacities, were officers *de facto*, and

therefore their acts as to third persons are valid and their proceedings legal. Smith and Reese discharged the functions of justice and constable for the county of Carson, and seem to have been generally recognized as legally constituted officers. It may often be a matter of extreme difficulty to determine whether a person discharging the duties of an office is to be deemed a mere intruder, or an officer *de facto*; but a stronger case in favor of clothing such persons with official character and giving validity to their acts could scarcely be presented than the one at bar. Indeed, whenever a person so discharging the duties of an office is not a mere usurper of his position, the reason and spirit of all the authorities incline to support him as an officer *de facto*, and to sustain and give validity to his acts.

It is said that on the one hand he is distinguished from a mere usurper of an office, and on the other from an officer *de jure*. The rule is dictated by the most obvious necessity. If the acts of public officers could at any time be overthrown by the showing of some irregularity or informality in their elections or appointment, all confidence in the judgment of courts would be destroyed, and judicial proceedings would ever be involved in doubt and uncertainty.

In the case of *The People v. White* (24 Wend. 539), this question is fully argued by the learned chancellor, who says:

"An officer *de facto* is one who comes into a legal and constitutional office by *color* of a legal appointment, or election to that office, and as the duties of the office must be discharged by some one for the benefit of the public, the law does not require third persons, at their peril, to ascertain whether such officer has been properly elected or appointed before they submit themselves to this authority, or call upon him to perform official acts which it is necessary he should perform."

Sutherland, J., in the case of *Wilcox v. Smith* (5 Wend. 234), uses the following language:

"There must be some color of an election or ap- [*198] pointment, or an exercise of the office, and an acquiescence on the part of the public for a length of time which

Opinion of the Court—Lewis, C. J.

would afford a strong presumption of at least a colorable election or appointment."

Viewing the position of the justice and constable in the case in the light of the authorities, they must be considered officers *de facto*, and their acts as to third persons be held valid.

But a more serious objection to the introduction of the judgment, and the subsequent proceedings thereon, arise from the failure to show that the justice had jurisdiction of the persons against whom the judgment was rendered.

It nowhere appears that the summons in that case was served within the territorial jurisdiction of the justice, nor that any of the defendants appeared, either personally or by counsel. This objection, independent of the others argued, was sufficient to authorize the judge below in excluding all the proceedings had before the justice. By the laws of Utah the jurisdiction of justices of the peace extended to the limits of their respective counties only. That service of a summons out of the county in which he had jurisdiction would be a nullity, there can scarcely be a doubt. A summons so served would have no more force or effect than if it were served out of the territory itself. If it were shown affirmatively that the summons was not served within the limits of Carson county, and that the defendants did not appear, no doubt can be entertained that the proceeding based upon such a service would be *coram non jure*, and void. No rule of law is more firmly established, or more generally recognized, than when any rights are claimed under or by virtue of the judgment of a court of special and limited jurisdiction, all the facts necessary to confer jurisdiction must be affirmatively shown. (2 Cow. & Hill's Notes Phil. Ev. 906; *Burns v. Harris* (opinion of Bronson), 4 Com. 374; *Bowman v. Russ*, 6 Cow. 233; *Smith v. Andrews*, 6 Cal. 654; *Swain v. Chase*, 12 Cal. 283; *Low v. Alexander*, 15 Cal. 296.)

Jurisdiction in superior courts is presumed until the contrary appear, but nothing is presumed in favor of the jurisdiction of inferior courts.

[*199] *The rule, *omnia presumuntur rite esse acta*, has

Opinion of the Court—Lewis, C. J.

application to the facts giving jurisdiction to such courts. In *Sollers v. Lawrence* (Willes's, 416), the court, in speaking of courts of limited jurisdiction, says: "The rule is that nothing must be intended in favor of their jurisdiction, but that it must appear by what is set forth in the record that they had such jurisdiction. The fact of the summons having been served upon the defendants would not necessarily bring them within the jurisdiction of the court; there must not only be a service, but there must be such service as will give the court jurisdiction. If a service out of the county would give no jurisdiction, the necessity of showing that it was *had within the county* is certainly as imperious as it is to show that service was had at all. It is claimed, however, by counsel, that because the constable states in his return that some of the defendants were not to be found within his county, that therefore the *presumption* is that those upon whom he obtained service were within the county; but the very acknowledgment that such a presumption is necessary, is itself a confession of the insufficiency of the return. The rule is inflexible that, no such presumption can be entertained. Though the judgment and proceedings under it were properly rejected when offered for the purpose of showing title in defendants, yet whether it should have been admitted when offered merely to show that the defendants were not mere naked trespassers is a question which it is scarcely necessary to pass upon in this case, as we think it perfectly competent for the defendants to have shown the outstanding title derived from Phillippi, independent of whether they were trespassers or not.

The court below erred in ruling out the deeds from Phillippi to McMahon, Swift and others. If these deeds established the fact that at the time of the conveyance to Small, Phillippi had no interest in the premises or claim in question to convey, Small got nothing and could convey nothing to the plaintiff. If the defendants were not allowed to show such a state of things, we should have the novel case of a plaintiff, having no title and never having been in possession, recovering a mining claim from one in the actual occupancy, and in whom the law presumes title. Surely

Opinion of the Court—Lewis, C. J.

[*200] this would not harmonize *with the rule of law frequently declared and acted upon—that the plaintiff must recover on the strength of his own title. If such rule were allowed to prevail here, the result would be that the plaintiff might recover the seventy-five feet claimed in this action, and McMahon, Swift and others might recover the two hundred and thirty-seven feet conveyed to them in another action. This action could not possibly be a bar to one brought by them, and thus the grantees of Phillips would recover three hundred and twelve feet upon conveyances from a person who had but two hundred feet himself. This seems to be the legitimate result of the rule insisted on by the plaintiff's counsel. That a mere naked trespasser cannot show outstanding title as against one claiming virtue of prior possession there is no question, but that such trespasser can show that the plaintiff, or those from whom he derives title, has parted with his right of possession by conveyance, or lost it by abandonment, is equally well settled on principle, if not on authority.

Where bare possession is relied on, it is but the enunciation of a clear principle of justice, to say that the mere naked trespasser shall not be allowed to set up an outstanding title to defeat the claim of one who, by prior appropriation or occupancy, shows a present right of possession. Ordinarily the proof of outstanding title is no defense to the plaintiff's claim, and where it is not, such proof should not be allowed. In fact, this rule, so frequently misapplied, is only applicable in those cases where, in admitting the outstanding title, still as against the defendant, the plaintiff would be entitled to recover. If A. mere naked trespasser ousts B., it can be no defense to B. to ouster that the real title is in C., because B., being in possession, has a right which is good against A., and all the world but the real owner; and as the inquiry in such a case would be confined to the question which of the two, A. or B., was entitled to the possession, it is evident that it would avail A. nothing to show that the real title was in C., as that would not justify his possession against one who *he had* evicted, or who shows a prior possession to him.

Opinion of the Court—Lewis, C. J.

Possession itself is a title, though of the lowest and most imperfect degree. (2 Bl. Com. 195.) Prior possession, then, is as potent to sustain *ejectment [*201] against all subsequent trespassers upon that possession, as the strict legal title itself would be; it would therefore be no defense in an action brought against a mere naked trespasser to recover possession upon such a title, that the strict legal title was in another. But the action of ejectment rests upon a present right of possession in the plaintiff. If, therefore, before action brought, the plaintiff conveyed away his title, or parted with his right of possession, or if he obtained no title from his grantors, to show that fact would not be so much, showing title in a third person, as that the plaintiff had voluntarily relinquished his right to the possession. That would be a direct answer and good defense to his claim of possession, whereas merely showing an outstanding title not derived from plaintiff, would be no defense to his right acquired by prior possession. If the plaintiff acquired no title by the deed from Small to him he would seem to have no ground upon which to recover in this case. It appears that prior to the time when defendants took possession of the Uncle Sam claim the deeds offered in evidence had been executed, and if they conveyed anything, conveyed Phillippi's entire interest in the claim. Neither was he in the actual possession of the claim at the time defendants entered. True, those who had been his co-tenants were in possession, but in no view could their possession be considered his after he had conveyed away all his interest; they then held possession, not for Phillippi, but for his grantee. So the ouster complained of was not an ouster of the grantor of plaintiff or those from whom he claims title, but an ouster of the first grantees of Phillippi, who alone would have a right to complain. If those deeds conveyed his title what right had Phillippi when defendants entered upon the claim? He was neither in possession nor had he the right of possession. Surely, then, he could show none of the facts which would entitle him to a recovery in ejectment. To support this action the plaintiff must show a *right of possession* in himself at the

Opinion of the Court—Lewis, C. J.

time of bringing his action. Would not the showing of conveyance by him or his grantors of all his interest in the claim at least go far to negative the presumption of such right of possession in him? If it can be shown that he was not entitled to possession because of his having [*202] abandoned his interest, upon what rule of logic or principle of law can it be said that the same fact may not be established by showing that by deed he conveyed away such right?

Are the loose circumstances by which abandonment is usually proven, better evidence to show the relinquishment of a right than a deliberate conveyance by a deed? The view of the case seems to be fully sustained by the cases *Bird v. Libros*, 9 Cal. 1, and the case of *Dyson v. Bradshaw*, 23 Cal. 528.

All the remaining questions presented by the record in this case, will necessarily be passed upon in reviewing the following instructions, asked by the defendants and refused by the court:

1. "The right to mine in the public land (and all land presumed to be public), gives the occupant no title to land. His only right is acquired by his appropriation in the manner prescribed by mining laws, and this right, after being acquired, is continued only by use and occupancy and is lost by failure to use or occupy."

2. "The jury is authorized to find, that a party loses his right in mining ground by such failure, even without intention to abandon."

No questions, perhaps, have ever engaged the attention of our courts which involved principles of greater or of more general importance than those presented for our consideration upon the instructions in this case. If we follow the reason and spirit of the decisions by the supreme court of California upon analogous questions, but few serious difficulties will present themselves in the solution of all the questions presented by the record in this cause; but if, on the other hand, they be disregarded, and we adopt the theories of the learned counsel for appellants, we are once launched into chaos and endless uncertainties, with

Opinion of the Court—Lewis, C. J.

precedent to guide and no legislation to direct the inquiries of the courts. Blindly to follow precedent, regardless of the reasons upon which it is founded, or its applicability to the character and the social and political condition of the people whom it is to affect, would be no less unwise than to ignore and repudiate it entirely. The decisions of the higher courts become part of the common law of our country, and they carry with them a weight of authority in proportion *to the ability of the court rendering them, and the [*203] obvious reasons upon which they are based. We do not feel authorized, therefore, to disregard such adjudications and adopt theories, the innovation of which might bring upon us more evils than are now occasioned by the defects of the present system.

Certainty in the law, more, perhaps, than in any other feature, gives it efficacy and secures the object for which it is created. Fluctuating and conflicting adjudications would be no less prolific of evil than conflict and uncertainty in the legislative enactments of a State. So far, then, as the anomalous rights and character of the miner locating upon the public land, for the purpose of mining, are defined and established by the courts of California, we feel it our duty to recognize them whenever their decisions may be applicable to our condition. Nearly the entire mining interest of this State has grown up under the fostering protection of the law as it was administered and recognized by the courts of that State. To repudiate the theory and principles upon which they have acted, would be to overturn the foundation upon which half our rights rest. The right to the possession of a mining claim, acquired by appropriation and occupancy, may be lost:

First. By forfeiture, where such rights are acquired and regulated by mining laws.

Second. Where no mining laws exist, and the right rests upon bare possession by failure to occupy, or to work the claim with reasonable diligence; and,

Third. By abandonment.

Usually the mining claims in this State have been located and worked with direct reference to the mining laws estab-

Opinion of the Court—Lewis, C. J.

lished in the district where the location is made. mining laws, when once established, are recognized by the courts, and indeed the legislature of our State has given them the force and binding obligation of legislative enactment. (Stats. 1861, p. 21, Sec. 77.) When those laws, therefore, directly point out how mining claims are to be located, and how the possession once acquired is to be maintained and continued, that course must be strictly followed, and a failure to do so might work a forfeiture of [*204] the ground. By the mining laws of the Hill district, all persons locating a claim are required to do three days' work upon it each month, and three months' work to the amount of fifty dollars would hold it for three months. If, in that district, neither of these requirements were complied with, there would be a forfeiture of the claim under those laws. When, therefore, the courts give title in the first appropriator, it can only be a title subject to the conditions imposed by the mining laws and conditions under and by virtue of which it was acquired. We cannot claim that the failure to comply with the conditions imposed by mining laws would work a strict forfeiture, but a forfeiture recognized by the courts of this coast from the earliest day, and which is certainly founded upon reason and just principles. But, in the absence of mining laws, and where the miner's right rests solely upon his possession, a different rule would obtain. The miner then locating a claim would hold only by actual occupancy, and his work for the development of the mine as would, under the circumstances, be deemed reasonable, and his possession would only be continued by occupancy and work. Such a claim might be lost by the failure to work upon or develop it with reasonable diligence, and the same amount of work which would hold a claim under the mining laws might not in all cases be sufficient to hold one where such laws existed. The loss of right in that case would therefore present a very different question from a loss of right by failure to comply with the requirements of mining laws. Abandonment is a word which has acquired a technical meaning, and there can be no reason why a di-

signification should be given to it when applied to the loss of right to a mining claim than that which it has received in the books. It is defined to be "the relinquishment of a right, the giving up of something to which we are entitled."

In determining whether one has abandoned his property or rights, the intention is the first and paramount object of inquiry; for there can be no strict abandonment of property without the intention to do so; thus differing from the loss of right by forfeiture under mining laws, or by the failure to use and occupy where no such laws govern, and in this, so, that abandonment may be complete the very instant the miner *leaves his claim, for time is not [*205] an essential element of abandonment; the moment the intention to abandon and the relinquishment of possession unite, the abandonment is complete. But lapse of time may often be a strong circumstance, when connected with others, to prove the intention to abandon, though the bare lapse of time, short of the statute of limitations and unconnected with any other circumstance, would be no evidence of abandonment—though the right might be lost, as before stated.

The cases upon which counsel rely to sustain the position that mere lapse of time, short of the statutes of limitation, will work an abandonment, are cases in equity, where the persons claiming its interposition had no strict legal rights, but relied upon the equity of their cause.

In such cases, upon a cardinal principle of equity jurisprudence, no relief will be granted if there has been an unreasonable delay in asserting the right or claiming the interposition of equity. This seems to have been the only point decided in the case of *Penderyast v. Tuston* (20 Eng. Ch. 97). There the directors of the United Mills Mill Company seem to have had the power to declare the shares of any of the members of the company forfeited if the installments on such shares were not paid within fourteen days after the day fixed for the payment thereof. Penderast's shares were so forfeited, and his only remedy was in equity to set aside the proceedings of the directors, and the court held that his delay in asserting or claiming his rights

Opinion of the Court—Lewis, C. J.

had been unreasonable, and denied the prayer of his bill. But had Pendergast a right which he could have claimed a court of law, no time short of the statute of limitation would have deprived him of it. By the application of the general views to the facts in this case, it is evident that there could have been no forfeiture or loss of right on the part of Phillippi, if his co-tenants or partners remained in possession and held the ground as required by the mining laws, for the rule that the possession of one tenant in common or partner is the possession of all, is too well established to be ignored at this time. But it is claimed that Phillippi abandoned his interest in the Uncle Sam Company before his conveyance to Small. That he could not [*206] abandon, *and that his co-tenants or partners could not have taken his interest when so abandoned, there is no doubt. But some circumstances beyond the mere lapse of time would be necessary to establish that fact. The case of *Waring v. Crow* (11 Cal. 365), is directly in point here, and however much its authority may be weakened by subsequent doubts of the learned judge who delivered the opinion of the court as to its accuracy, the decision is certainly based upon reason and the sounder principles of law. And though it is urged here with great earnestness that persons owning and associated together in working a mine are not tenants in common, but mining partners, the result in this case would seem to be the same in whichever character they may be clothed. The authorities generally seem to clothe such persons with the double character of mining partners and tenants in common. As to liabilities properly incurred in the development of a claim, they have been held to be answerable as partners; but with relation to the claim itself, they seem to be generally recognized as tenants in common, and there seems to be no sufficient reason for departing from those authorities in this case. We conclude that the possession of one partner or tenant in common inures to the benefit of all until such possession becomes adverse, and that the absence of Phillippi, and refusal to pay assessments for a period short of the statutes of limitation, would give his partners or tenants in common no right

Opinion of the Court—Lewis, C. J.

or title adverse to him in his interest in the Uncle Sam claim; but such lapse of time, with other circumstances tending to show abandonment, might go to the jury to establish it. There seems to be no urgent necessity for adopting a new rule at this late day, as there seems to be no obstacle in the rule itself to complete justice in any case. If one partner or tenant in common, after having become associated with his co-tenants in the development of the claim, *voluntarily* leaves it in the possession of his companions, and refuses to bear his proportion of the expenses incurred by them in development of the same, and should afterwards bring his action to recover his interest, undoubtedly, upon a proper application, the equity side of the court would defer his recovery until he had paid his full proportion of the expense incurred in the development and *improvement of the claim; and on the other [*207] hand, if he had been wrongfully ousted from his possession or rights, the persons so ousting him, or those claiming under them, can acquire no title in the claim adverse to him short of the statute of limitations, and of course could not ask the interposition of equity.

In this view of the case, the court below properly gave instructions two, five, six and nine, asked by plaintiff, and erred in refusing to give instructions one, two and three, asked by defendants.

The judgment below must be reversed, and a new trial ordered.

BEATTY, J., having been counsel in a similar case against the Uncle Sam Company, did not participate in the hearing of this cause.

Opinion of the Court—Beatty, J.

[1 NEVADA, 207.]

WILLIAM ALFORD ET AL., RESPONDENTS, v. NATHANIEL DEWIN ET AL., APPELLANTS.

RESPONSE TO PETITION FOR REHEARING.

¹ TENANTS IN COMMON—EJECTMENT.—Tenants in common may join in an action to recover possession of the common property.

ABATEMENT.—Where parties having a joint right of action bring suit, and pending the litigation sever their interests, the suit will not abate.

SURVEY—WHAT SUFFICIENT—A survey, in which all the corners are marked and all the lines run and marked except the closing line between the first and last corner stake, is a legal survey under the Utah statutes.

IDEM—POSSESSION AND INCLOSURE.—Plaintiffs claiming the right of possession under a survey, are not bound to show they inclosed the land within one year after the survey, when the defendants entered within the year.

THE facts are stated in the opinion.

Nourse & Lewis, for Petitioners.

Cor & Gaston, for Respondents.

[*208] *By the Court, BEATTY, J.:

This case was decided by the territorial court of Nevada, and comes before us on petition for rehearing. That our views of the case may be made more intelligible (the original opinion not being published), we will treat it rather as one coming before us for decision than as a mere application for rehearing.

The facts are as follows: Plaintiffs and others, in the fall of 1859, commenced some improvements on a tract of timber land. In the summer of 1860 the plaintiffs and others then interested with them, caused a survey to be made by the county surveyor of a portion of land including the improvements already made, and had this survey recorded.

The survey, certificate of surveyor, etc., is not in the transcript. It would seem probable, from the description of the land contained in the complaint, and imperfect and

complete evidence contained in the transcript, that the survey was made either in the form of a parallelogram, or else of a six-sided figure, being a parallelogram less a square notch taken out of the northeast corner.

All the corners of the survey seem to have been fixed by the *surveyor, but the west line connecting [*209] the southwest and northwest corners, was not run or marked through.

In the fall of 1860, a few months after the survey was made, defendants came within its lines and commenced their improvements.

Before the commencement of this suit one of the parties in the original survey (Lovejoy) got his interest therein segregated and set apart to him. The remaining owners, or parties interested in the survey, then brought suit against Lovejoy and those parties who had gone within the lines of the survey in 1860. There were also one or more defendants who had entered since 1860 as successors in interest of those who made the original entry.

The land sued for is a six-sided figure, being a parallelogram, less a square notch out of the northeast corner. There is nothing in the transcript to show whether the land sued for embraces the whole of the original survey, or whether (which is quite probable) the notch in the northeast corner is caused by segregation or setting off that notch to one of the locators.

At the trial the suit was dismissed as to Lovejoy, and a general verdict against the other defendants. The judgment was for the land described in the complaint, "save the portion claimed by Lovejoy," and for costs, but no damages.

It further appears in evidence that after suit was brought, but before judgment, there had been deeds of partition between two of the plaintiffs, whereby there was an attempt by these two to segregate portions of the land between themselves.

As the original brief of appellants is much fuller on all the points made on appeal than the petition for rehearing, and embraces the same propositions, we will notice the

Opinion of the Court—Dexie, J.

points in that brief which we think embrace propositions requiring a settlement in this court.

The appellants complain that certain instructions by them were refused.

As the principles upon which those instructions were refused will be discussed in noticing other points we need not more particularly refer to them.

The next point after the instructions made by appellants is, that plaintiffs could only recover as joint tenants, and it was *necessary that all jointly entitled persons should join in the action. That the evidence shows that Goss and others were jointly interested, and that they are not parties plaintiffs.

We think the facts do not sustain this proposition. It is true, that Goss and others, who are not parties plaintiffs, were parties to the survey; that they were interested in having the survey made. But it is not shown that they were in possession of any portion of the land surveyed when defendants are alleged to have entered any portion sued for, at the time this suit was brought. They may have abandoned their interest in the survey, or they may have sold to their co-tenants, or their portion may have been sold to them. The statement on motion for judgment does not show that it contains all the testimony. If it is shown that a conveyance is shown to have vested title to real estate in a party, perhaps the legal presumption would arise that title remained in that party until he was shown to have parted with it. But we are not satisfied that after a party in possession of public land, the law would presume that party always to remain in possession. But be it as it may, in this case the statement not purporting to contain all the evidence, we think suppose, in support of the proposition, that the ten-tenants in Goss and others of the land surveyed was sufficiently accounted for.

The next point made is that plaintiffs were ten-tenants, and as such could not maintain a joint action, and in this proposition several authorities are quoted.

We think counsel have misunderstood the authorities.

Opinion of the Court—Beatty, J.

quoted, with the exception, perhaps, of the California cases cited. Where the fictions of the common law prevail, it has frequently been held that the action of ejectment cannot be sustained on a joint demise of all the tenants in common, but that if the right of possession rests in several tenants in common, and they desire a judgment for the entire premises, you must in the declaration aver several demises by each of the several tenants. Now, as these demises are a mere fiction, having no existence in reality, and the plaintiff is a mere nominal party, the suit being really prosecuted by those persons from whom the plaintiff is alleged to have received his demises, the result of these decisions is that tenants in common may *join in the prosecution [*211] of an action of ejectment, but in so doing must follow certain forms different from those followed by joint tenants.

When any controversy has arisen about the joinder or non-joinder of tenants in common in an action of ejectment, it has been not in regard to the rights of such tenants to join in prosecuting the action, but as to matter of form in pleadings. Even on the matter of form, the decisions have not been uniform.

Many courts of the highest authority have held that a declaration on the joint demise of tenants in common was good.

For a forcible and common-sense decision of this kind we would refer to Caine's Rep. 169. Whilst it is held generally that fictitious demises of tenants in common to the plaintiff in ejectment must be several, yet it is held that if tenants in common make a real joint demise to a tenant, that tenant may maintain ejectment on a fictitious demise to a nominal plaintiff. (See Adams's Eject. 210, marginal p.) We cannot see any reason why this distinction is made.

If tenants in common may join in an actual demise or lease of the common premises, and the party holding under that demise may maintain his possession, we cannot see why in the case of a fictitious demise the plaintiff in ejectment should be held to have no right of possession.

When the action of ejectment was first introduced into

Opinion of the Court--Beatty, J.

practice in England, the demise to the plaintiff was real and not fictitious.

If, then, two or more tenants in common owning and having right of possession to a tract of land, had all gone on to the land, and whilst actually thereon had joined in a lease to one tenant, put him in actual possession of the whole, and he had subsequently been expelled, doubtless he could have maintained the action of ejectment. Because he was actually in possession of the whole premises, placed there by the parties who had a right to place him there, and being rightfully in possession of the whole and expelled from the whole, he would be entitled to recover the whole. His right would arise from his rightful possession, and [*212] not from the particular form of the instrument by which his right was evidenced. Then, when the lease, entry and ouster became mere fictions, confessed by the defendant to avoid trouble and delay, we can see no reason why the court should have adopted the rule that demises by tenants in common should be several and not joint.

For these reasons, we are much inclined to believe the doctrine laid down in 2 Caine (to which we have before referred), is the better rule, although the weight of authority is certainly the other way.

But whatever rule might be established in regard to the proper form of demise by tenants in common, it would not determine the question before us. We have in our practice no action of ejectment.

When a suit is to be brought for the possession of land, the claimant makes no demise, real or imaginary.

This suit is not brought in the name of a real or imaginary tenant. The claimant brings suit in his own name, asserting simply his title to the land, or his right of possession as against the then occupant. It may be possible under some circumstances for a plaintiff to recover, although the proof might show that he had no right to the land, but had himself been a mere naked trespasser thereon.

As, for instance, A. has a perfect title to a piece of land; B. disposses A., and acquires complete possession, and leases the land to C. C., the tenant, at the expiration of his term, refuses to surrender the possession to his landlord. There

il, 1865.]

ALFORD v. DEWIN.

Opinion of the Court—Beatty, J.

There be no doubt B. may recover possession, although C. has a new lease from the real owner, A. Now, under the common law system, if B. had brought his action of ejectment, he could recover in the case stated; because ejectment simply determines the right of possession as between plaintiff and defendant. But if he had brought the writ of right, which is a real action determining the *title* to the land, showing the title in A. would have defeated the action. Tenants in common have unity in possession, but not of title. Therefore, they must join in actions for injury to their possession, but cannot join in real actions, when the question of title alone is determined. (See 2 Bl. Com., 11th ed., p. 174, note 29.)

Our action is one which may be brought merely to establish the right of possession as against defendant, or it may be one in which the ultimate right to the property is to be determined; therefore all the old common law rules are inapplicable.

It appears to us we are left without authority on the point, and may establish that rule which will be most conducive to justice and the general convenience of the community.

Here, where mining claims are frequently owned by hundreds of tenants in common, it would be extremely inconvenient to hold that each one having an interest in the claim must sue separately whenever the possession of the claim is wrested from the rightful owners. There being, in our opinion, no respectable authority to the contrary, we shall hold that under our system all tenants in common may join in an action to recover possession of the common property.

The next point made by appellants is, that Alford having assigned to Persons all his interest in certain portions of the premises sued for pending the suit, and Persons having assigned his interest in certain other portions in like manner to Alford, neither was entitled to a joint judgment for the whole. That their right to a joint judgment had ceased before the trial, if it ever existed.

We are referred to the 256th section of the practice act in support of this position.

Opinion of the Court—Beatty, J.

That section reads as follows:

“In an action for the recovery of real property, if the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment shall be according to the fact, and the plaintiff may recover damages for withholding the property.”

We do not understand that section as the counsel for appellants understand it. We think that section has reference to those cases where the title of plaintiff only consists of a tenancy of a temporary estate, and that estate terminates by the lapse of time, or happening of some contingency upon which it was dependent during the litigation. We think if a party having a title to real estate brings a suit for it against a disseizor, and pending that suit he sells the title (as he may rightfully do under our statute [*214]) the suit will not abate, neither will the plaintiff be restricted to damages, but he will get a judgment for the possession, which will inure to the benefit of the vendee. If the plaintiffs had a right to a joint judgment when the suit was brought, no subsequent severance could deprive them of the right to have that judgment. It is the policy of our law to prevent alienations of real estate even pending litigation.

The next point in appellant's brief, requiring notice, is the objection raised to the sufficiency of the survey. Appellants objected that the survey was insufficient to confer any title on the plaintiffs, because the surveyor omitted to run and mark the west line.

The laws of Utah Territory, pp. 174-5, of printed laws, provides for the appointment of county surveyors, and directs them in certain cases to make surveys, etc., and provides that their “*certificate of survey shall be title of session to the person or persons holding the same.*” It does not point out how the surveyors shall make his survey. Now, if the three sides of a quadrilateral survey are run by the simple running of a straight line, connecting the extreme ends of the two side lines, completes the survey. This may be done without difficulty by almost any one. All the data

Points decided.

determining the exact location of the land in the survey is given. We are not prepared to say it is not a survey because one line is left open. The beginning and the end of that line are given. In running the line all that could be done in addition would be to mark the line between the corners. If a quadrilateral survey was so made as to establish the four corners without running any of its external lines, it might be a good survey.

We think this objection to the survey is not well taken.

Another objection to the plaintiff's right to recover, is that they did not inclose the land, as required by the Utah statutes, within one year after the survey. A complete answer to this is, that before the expiration of the year the defendants had entered. The plaintiffs being wrongfully ousted could not fence.

At least this is sufficient excuse for not fencing. For these reasons a rehearing is denied.

LEWIS, C. J., having been of counsel, did not sit in this case.

MATEO OREAMUNO, RESPONDENT, v. THE UNCLE SAM GOLD AND SILVER MINING COMPANY, APPELLANT.

[1 NEVADA, 215.]

¹ **MINING LAWS, RULES AND CUSTOMS MUST BE COMPLIED WITH.**—To enable a party to maintain a right to a mining claim after the right is acquired, it is necessary that the party continue substantially to comply with the mining rules and customs established and in force in the district where the claim is situated.

² **ABANDONMENT.**—Abandonment is a mixed question of law and fact. If, in fact, a person intend to give up his claim and quit paying assessments in pursuance of that intention, it is an abandonment in fact.

³ **DEED—FORFEITURE.**—A party who insists upon forfeiture or abandonment, and relies thereon to build up a right in himself to the thing, franchise or easement, forfeited or abandoned, is, upon first principles, bound to establish the fact or facts upon which his asserted claim of right depends.

APPEAL from the First Judicial District of the State of Nevada, Storey County, Hon. RICHARD RISING presiding.

Opinion of the Court—Brosnan, J.

The facts in this case are substantially the same as those in the case of *Mallett v. The Uncle Sam Company* (1 Nev. 188), with the exception that the record of judgment by the justice of the peace was not introduced in this case.

Crittenden & Sunderland, J. B. Harmon, and Quint Hardy, for Appellants.

Baldwin & Hillyer, for Respondent.

By the Court, BROSNAN, J.:

This is an action brought to recover twenty-five feet of mining ground, now held by the defendant. The plaintiff alleges that in May, A.D. 1860, he was the owner, and in the possession, of the ground in controversy. He also avers an ouster, and an unlawful holding by the defendant in the usual and ordinary form.

The answer admits the ownership and possession of the plaintiff, as by him alleged, and sets up affirmatively in defense of the action:

First. That the plaintiff abandoned all his right to the ground before the commencement of this suit, and

[*216] *Second. That the defendant became owner of the ground claimed in March, 1861, and is still the owner, and in possession thereof.

From the statement on file, it appears that *all* the testimony taken on the trial is contained in the statement. After a careful examination of this evidence, we fail to discover wherein it is competent to establish either proposition or the defense.

Looking to the testimony in its pertinence and relation to the pleadings, and the verdict based thereon, the case is quite simple, and of easy solution. However, a long series of instructions to the jury have been requested by the counsel of both parties, many of which seem to have little relevancy to the facts disclosed by the evidence, but which are calculated rather to mystify than clear up the real questions involved. These instructions demand a brief consideration from the court.

The defendant's counsel takes exception to certain enumerated instructions, given at the request of plaintiff. Of these instructions the fifth, sixth and seventh relate to the force and effect of some judgment, execution and proceedings had under them, which judgment and proceedings were incidentally mentioned on the trial, but nowhere legally proved to exist, or to have taken place. Whilst it may be said of these particular instructions that they were, in our opinion, irrelevant, still we cannot see that they have in the least degree prejudiced the case of the defendant.

As abstract propositions of law, they seem to be correct, and could not, in any manner that we can discover, mislead the jury.

The eighth, eleventh and thirteenth instructions on the part of the plaintiff, with which also the defendant finds fault, have been properly given. They relate to the question of an abandonment at common law, and are a fair exposition of the law on that subject.

We see no error, therefore, in giving the instructions set forth in behalf of the plaintiff, that would justify us in sending the case back for a new trial.

This brings us to an examination of the questions arising upon the refusal of the court to give certain instructions *prayed for by the counsel of the defendant, [*217] and the modifications of others by the court.

It will be observed, judging from the instructions asked to be given on the part of the defendant, that the learned counsel mainly relied upon the fact of the abandonment, for nearly all the instructions proposed by him are directed to that question. They vary in form, but are substantially burdened throughout with the same idea—an abandonment; if not in the common law acceptance of the term, then such abandonment or loss, or relinquishment of right as results from neglect to comply with the mining rules and customs of the district.

We think the question, in both respects, was presented fairly to the jury, and that the rulings of the court below on this point were as favorable to the defendant as counsel could reasonably expect.

Opinion of the Court—Brosnan, J.

The third instruction, given at defendant's request, is in the words following:

"To enable a party to maintain a right to a mining claim after the right is acquired, it is necessary that the party continue substantially to comply with the mining rules and customs established and in force in the district where the claim is situated, upon which such right is made to depend.

In the fourth instruction, the court, at the request of defendant's counsel, advised the jury as follows:

"An abandonment is a mixed question of law and fact. If in fact the plaintiff intended to give up his claim and quit paying assessments, in pursuance of that intention, it was an abandonment in fact."

These instructions embrace the entire question involved and submit the whole case fairly to the consideration of the jury. Under them the jury were at liberty to find a failure of the plaintiff to comply with the mining rules and usage of the Gold Hill district, or that he had absolutely abandoned the claim, and upon the finding of either fact the verdict would have been for the defendant. In this view of the case the defendant has no reason to complain of the modifications of, or the refusal of the court to give the other instructions subsequently asked.

The sixth instruction asked by the defendant is not [*218] law and was properly refused. A party who insists upon a forfeiture or abandonment, and relies thereon to build up a right in himself to the thing, franchise or easement forfeited or abandoned, is, upon first principle, bound to establish the fact or facts upon which his asserted claim of right depends.

It is not necessary to notice the instruction further in detail. There is some obscurity in a portion of the instruction given by the court below, in place of the seventh instruction asked by the defendant; but, in our opinion, it could not have in anywise affected or influenced the verdict. So far as the real question in controversy is concerned, it was fairly submitted under the principles of law relating to the loss or abandonment of a mining claim, as enunciated by this court at the present term, in the case of *Mc*

Statement of Facts.

against the same defendant, and also in the case of *St. John v. Kidd* (26 Cal. 263).

The judgment of the court below is accordingly affirmed.

BEATTY, J., having been interested as counsel in a similar case against the Uncle Sam Company, did not participate in the hearing of this case.

SAMUEL DOAK, RESPONDENT, v. GEORGE W. BRUBAKER, APPELLANT.

[1 NEVADA, 218.]

¹ **SALE OF PERSONAL PROPERTY—DELIVERY OF POSSESSION.**—Delivery of possession of personal property may be either actual or constructive. An actual delivery is contemplated by the statute, unless such delivery be impossible or extremely inconvenient, in which case a symbolical delivery is sufficient.

NOTE.—Where the property is in the possession of a bailee also, actual delivery is not necessary; the only delivery which could be made would be to give an order for it, or deliver the receipt, or obtain the recognition of the bailee; but when in the possession of an agent or servant a different rule prevails.

² **NOTE—STATUTE OF FRAUDS.**—To take the case out of the operation of the statute of frauds there must not only be a transfer of the right of property, but the possession must accompany it.

APPEAL from the District Court of the Second Judicial District of the Territory of Nevada, for Douglas County, Hon. GEO. TURNER presiding.

This action was brought to recover the possession of a certain *number of cattle, and damages [*219] for their detention. The only question raised relates to the sufficiency of the evidence to show a delivery of the cattle. The court found that there was a debt due to plaintiff from Chedic and Milne, that such debt was *bona fide*, that the mortgage was taken in good faith for the purpose of securing his debt, and not in consideration of the failing circumstances of the debtors.

As to the sufficiency of the delivery of the cattle under

(1) 2 Nev. 260.

(2) 2 Nev. 242; 4 Nev. 361; 6 Nev. 215; 6 Nev. 335; 10 Nev. 416.

Opinion of the Court—Lewis, C. J.

the chattel mortgage by Chedic and Milne to the plaintiff the court says:

"The court, upon the issue as to the sufficiency of delivery of said cattle, hold that the same was not sufficient under the law. There were some four hundred head of the same. The mortgage was executed, and mortgagor and mortgagee went out from Carson city to have the delivery made. Mr. Daniel Dean was herdsman for Chedic. Some thing like a hundred head of cattle were in sight; part two other droves were also about there. Chedic says, 'Here they are; you see the brands and marks; some of them are here; I deliver them,' and stated the number in all at four hundred and fifty head. Thereupon Chedic discharged Dean, and Doak employed him at once, and he continued right on in charge of the cattle," etc.

The cattle were running at large at the time of the execution of the mortgage, and continued so up to the time they were levied on by the sheriff.

Thos. Sunderland and W. S. Wood, for Appellant.

P. H. Clayton, for Respondent.

[*221] *By the Court, LEWIS, C. J.:

But one question is raised on the record in this case; i. e. Do the facts found by the court show a delivery of the cattle sufficient to enable the plaintiff to hold them against the creditors of the mortgagor?

Section 64 of "An act concerning conveyances," Law of 1861, provides that "every sale made by a vendor of goods and chattels, in his possession, or under his control and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and followed by an actual and continuous change of possession of things sold or assigned, shall be conclusive evidence of fraud as against the creditors of the vendor, or the creditor of the person making such assignment, or subsequent purchasers in good faith."

Section 66 of the same act, providing that no mortgage of personal property shall be valid against any other person.

than the parties thereto, unless possession of the mortgaged property be delivered to the mortgagee, is in fact embraced in section 64, for a mortgage of personal property is legally an assignment thereof. There can be no difference in the character of the delivery required then, whether the property be sold absolutely, or assigned by mortgage.

And, indeed, the evident purpose of both sections is the same: the prevention of the frauds which would necessarily result from the practice of permitting the right of property to be in one person, and the possession and all the indicia of the right of property being in another.

Delivery of possession of personal property may be either actual or constructive, and it seems that an actual delivery is *contemplated by the statute, unless, [*222] indeed, such delivery were impossible or extremely inconvenient, in which case a symbolical delivery would doubtless be sufficient. If property mortgaged could be transferred to the mortgagee by a mere constructive or symbolical delivery, where actual delivery can be readily made, practically these sections of the statute would be entirely nugatory, and their object totally defeated. There being no means by which the public can ascertain whether personal property is mortgaged or not, except by the change of possession, and the person in possession, and exercising ownership over it, being presumed to be the owner, if after being mortgaged it were allowed to remain in the possession of the mortgagor, mortgage after mortgage might readily be placed upon it. This being the very evil sought to be remedied by the statute, we think such a construction should be put upon it as will most effectually carry out its object. To accomplish this purpose, and to secure probity and fair dealing in transactions of this kind, the opportunities of fraud must be removed. There must not only be a transfer of the right of property, but the possession must accompany it. The authorities are certainly conflicting upon the question of what will constitute a delivery of possession, but we can find no case which goes to the length of holding that mere words are sufficient where a tradition of the property is possible.

In the case at bar no act was done which would indicate the intention of the parties, or to give notice to the world that a transfer of possession had taken place. The cattle were left where they were before the execution of the mortgage, and under the control and charge of the same herdsman. Had there been a change in the herdsman, that would have been an act evidencing the change of property, and would probably have been sufficient to have effected a delivery. But here, to all outward appearances, there was no change of property, or of the possession, when a delivery could easily have been made, and thus the mortgagor might have obtained credit upon the cattle, or sold them to another, after he had in fact parted with all his right by mortgage to the plaintiff.

It is well settled that a symbolical delivery merely [*223] is *sufficient of ponderous articles of which it would be a matter of great difficulty to make an actual delivery, as the case put by Chancellor Kent, of a column of granite, which, by its weight and magnitude, was not susceptible of any other delivery than that of the consent of the parties on the spot. But many of the courts have gone further, and held that a symbolic or constructive delivery is sufficient where actual delivery is merely inconvenient. But such a rule, if adopted here, would destroy the entire efficacy of the statute, for parties would always find it convenient to prove the inconvenience of a delivery whenever the question was raised.

Where the property is in the possession of a bailee, also, an actual delivery is unnecessary, because the vendor himself not having the possession, the only delivery which could be made would be to give an order for it, or deliver the receipt and obtain the recognition of the transaction by the bailee.

Thus it is said the "taking a bill of parcels and an order from the vendor to a storekeeper for the goods, and giving and marking them with the initials of one's name," is a delivery. So, also, with the taking a bill of parcels, and an order on the warehouseman and paying the price.

And the mere communication of the vendor's order or

Opinion of the Court—Lewis, C. J.

wharfinger or warehouseman, for delivery, and assented to by him, passes the property to the vendee. In the case of *Tuxworth v. Moore* (9 Pick. 347), the vendor of a horse in the possession of a bailee, sold it, and ordered the bailee to deliver him to the vendee, and upon the request of the vendee, he continued to take charge of the horse as before the sale, and it was held to be a good delivery, even against the creditors of the vendor. But in all these cases the property was not in the possession of the vendor at the time of sale, for the possession of a bailee who has a special property in the thing bailed, cannot strictly be considered the possession of the bailor, and therefore the only delivery which could be made, as before suggested, was by an order on the bailee.

But in the case at bar, the cattle were in the possession and under the control of the mortgagor, for the herdsman was merely his servant or agent, having no property in the cattle, and whose possession was only for his master, the mortgagor. *If Dean were a bailee, and not a [*224] mere servant, the delivery here would undoubtedly be sufficient under the authorities referred to, and also under the statute, which only requires a delivery when the property is *in the possession of the vendor or under his control*.

We can find no authority which would sustain a delivery of this kind where the property is in the charge of a servant, and is susceptible of actual delivery; but on the other hand, the case of *Hurlburt v. Bogardus* (10 Cal. 519), is directly in point against the appellant here.

The judgment below must be affirmed.

Points decided.

STATE OF NEVADA, RESPONDENT, v. JAMES
KELLY, APPELLANT.

[1 NEVADA, 224.]

¹ **JUROR—WHEN COURT MAY EXCUSE.**—When there is any probability that a juror is disqualified, and the court is unable to determine it by reason of its inability to establish the fact constituting such disqualification, it is not required to hazard the regularity of its proceedings by permitting such person to sit as a juror, but may excuse him at any time before he is charged with the case.

MURDER—INSTRUCTIONS.—The court gave the following instruction: "The jury find from the evidence that James Kelly, on or about the time alleged in the indictment, received a mortal wound of which he died in Storey county, within a few days thereafter, caused by a shot from a pistol in the hands of defendant, and that said pistol was discharged accidentally; yet if they find that defendant was exhibiting said pistol in a rude, angry and threatening manner, and not in necessary self-defense, and that such act in its consequences naturally tended to destroy the life of a human being, then they may find defendant guilty of murder." *Held*, correct.

MANSLAUGHTER, WHAT CONSTITUTES.—The court gave the following instruction: "If the jury find from the evidence that James Kelly, on or about the time alleged in the indictment, received a mortal wound of which he died, in Storey county, within a few days thereafter, caused by a shot from a pistol in the hands of defendant, and that said pistol was discharged accidentally; yet if they find that defendant was exhibiting said pistol in a rude, angry and threatening manner, and not in necessary self-defense, then they may find the defendant guilty of manslaughter." *Held*, correct.

CHARGE—WHEN NOT PREJUDICIAL.—The language, "A ruffian, out of wantonness, firing into a crowd upon a sudden motion, is as guilty as if he had lain in wait for his victim," used by the court in stating the legal issue to the jury: *Held*, not to be prejudicial to defendant.

APPEAL from the First Judicial District of the Territory of Nevada, Storey County, Hon. J. W. NORTH presiding.

Instructions six and seven, referred to in the opinion, are contained in the syllabus.

The other facts sufficiently appear in the opinion.

Taylor & Campbell, for Appellant.

Dighton Corson, for Respondent.

Opinion of the Court—Lewis, C. J.

*By the Court, LEWIS, C. J.: [*226]

All presumptions being in favor of the regularity of the proceedings of the court below, we cannot say that it erred in excusing the juror John Gillig. He did not himself recollect whether he was on the grand jury who found the indictment against the defendant or not, and it appears that the record by which that fact might be ascertained could not be found. Had Mr. Gillig been one of the grand jurors who found the indictment, it would have been error to have allowed him to act upon the trial jury in this case; and if that fact was shown after verdict, it would have necessitated a new trial. When there is any probability that a juror is disqualified and the court is unable to determine it, by reason of its inability to establish the fact constituting such disqualification, as in this *case, it is not re- [*227] quired to hazard the regularity of its proceedings by permitting such person to sit as a juror, but may excuse him. It is claimed, however, that sufficient search was not made for the record; but that is a fact which cannot be determined here, for the reason that the judge below may have as clearly satisfied himself by a search of five minutes' duration as he might in five days, that the record could not be found, and as that was a matter resting entirely in his discretion, and as there is no evidence to the contrary, we must presume that everything that the exigency of the case required was done.

Indeed, it seems that in cases of this kind, the right of the court to discharge a juror at any time before he is sworn and charged with the cause, is fully sustained by the authorities. (2 Gra. & Wat. New Trials, 192; *Stewart v. The State*, 1 McCook's (Ohio), 66; *United States v. Cornell*, 2 Mason, 91; *Haines v. The State*, 6 Humph. 597.)

In the case of *The United States v. Cornell*, Judge Story uses the following language:

"Even if a juror had been set aside by the court for an insufficient cause, I do not know that it is a matter of error if the trial had been by a jury, duly sworn and impaneled, and above all exception. Neither the prisoner nor the government in such a case have suffered any injury."

Opinion of the Court—Lewis, C. J.

The second assignment of error is the giving of instructions four, six and seven, asked by the prosecution.

Instruction four is a literal copy of section 21 of the act concerning crimes and punishments, Laws of 1861, and certainly was not impertinent to the facts as they appear upon the record. Instructions six and seven also seem equally free from exception, and correctly placed the law of the case before the jury.

All the language used by the judge below, in his charge to the jury, to which defendant takes exception, was employed only in a hypothetical case, used in explanation of the crime with which the defendant was charged, and could in nowise prejudice him in the minds of the jury. The sentence, "A ruffian, out of mere wantonness, firing into a crowd upon a sudden motion, is as guilty as if he had lain in wait for his *victim," had no reference to the defendant. The language was only used in defining the crime with which he was charged, and was necessary to enable the jury to determine whether the facts in this case constituted such crime.

There is a material distinction between the case of *The People v. Williams* (17 Cal. 147), and the one at bar. In that case language was used by the judge at *nisi prius*, which might have been taken as an indication of his conviction of the prisoner's guilt. The deceased was spoken of as the "victim" of the defendant. The judgment, however, was not reversed upon that point. But no such expressions are used in this case with reference to the defendant, and there seems to be nothing to indicate the opinion of the court below as to his guilt or innocence.

Judgment affirmed.

Opinion of the Court—Beatty, J.

ILLIAM ALFORD ET AL., RESPONDENTS, v. FRANK
BRADEEN ET AL., APPELLANTS.

[1 NEVADA, 228.]

RIGHT IN COMMON—REPLEVIN.—Where one tenant in common sells the right to a stranger to cut timber off the common property, another tenant in common of the same property cannot maintain replevin for the timber after it has been cut.

APPEAL from the Fourth Judicial District of the State of Nevada, Washoe County, Hon. C. C. GOODWIN presiding.

The facts of this case are stated in the opinion of the court.

Geo. A. Nourse, Attorney-General, for Appellants.

Clayton & Clarke, for Respondents.

*By the Court, BEATTY, J.:

[*229]

This case was originally tried in the probate court of Washoe county; appealed from that court to the district court, where the judgment of the probate court was affirmed, and an appeal is now taken from the district court to this court.

The facts, as we gather them from a not very full or clear statement on appeal from the probate court, are as follows:

In January, 1864, James W. Ahart and John Barnes were the owners of a timbered ranch, Ahart owning three-fourths interest and Barnes one-fourth interest therein. Ahart mortgaged his interest to the defendants, and at the same time executed to them a deed, absolute on its face, to take effect, says Ahart in his testimony, on the 23d of May, if the money secured by mortgage was not repaid by that day. At the same time this deed and mortgage were executed, Ahart put defendant in possession of the land as a further security for the money loaned, and with a written agreement as to cutting timber off the land on certain terms mentioned in the contract, Ahart being paid in advance for the timber to be cut. In March, 1864, a short time after the contract between Ahart and the defendants, Barnes,

Opinion of the Court—Beatty, J.

the owner of the other one-fourth interest, also entered into a contract with defendants, allowing them to cut timber on any part of the ranch, paying him, Barnes, one dollar [*230] and seventy-five cents per thousand. The *contract between Ahart and defendants is referred to in the statement on appeal from the probate court, but is not contained in the transcript filed in this court. The contract of Barnes with defendants, we suppose, was verbal, and its character is not very fully stated by Barnes. Whether the one dollar and seventy-five cents was to be in full for each one thousand feet of timber, or for Barnes's one-fourth interest therein, does not appear.

About the 3d of May, 1864, plaintiffs bought the interest of Ahart in this ranch, subject to the mortgage, and Ahart testified subject to his contract for the cutting of timber etc. Some difficulty would seem to have arisen between plaintiffs and defendants about the redemption of the mortgage and the surrender of the mortgaged premises by the defendants who were the original mortgagees. From the imperfect statement of the case we have before us, we are at a loss to understand the nature of the difficulty. The misunderstanding between the parties culminated in plaintiffs bringing an action in the nature of replevin for timber cut by defendants on the ranch. The plaintiffs recovered judgment in the probate court, and that judgment was affirmed in the district court. Various questions arose in the course of the trial which we do not deem it necessary to pass on. Nor are the facts so shown in the record as to enable us to pass on all the points raised. Whether the right of the defendants to cut timber under the contract with Ahart had ceased or not before the timber in controversy was cut, we are utterly unable to determine from the want of a clear statement of facts.

But one fact is admitted by all parties—that defendants had the privilege granted to them by one of the owners or tenants in common of the ranch—to wit, Barnes—to cut this very timber.

There can be no doubt Barnes, as a tenant in common, might cut timber himself on the ranch, or he might authorize

Opinion of the Court—Beatty, J.

ize another to do what he himself could do. (See *Baker v. Wheeler & Martin*, 8 Wend. 505.) Whatever the rights or remedies of the other tenants for recovering their share of the value of the timber cut and sold, they could not take the timber from one to whom Barnes had sold it.

*The instructions given by the court at the in- [*231] stance of plaintiffs were excepted to, but are not contained in the statement on appeal.

We cannot tell what they were, and of course cannot say they were erroneous.. One of the grounds for a new trial attached to statement on appeal is that the verdict is against law and evidence, and on that ground the judgment is reversed. The district court will set aside the judgment in the probate court, and order a new trial in the district court, unless the plaintiffs should elect to dismiss their action.

LEWIS, C. J., having been of counsel in this case, did not participate in the hearing.

CHARLES LAMBERT, RESPONDENT, v. B. MOORE, APPELLANT.

[1 NEVADA, 231.]

JURISDICTION OF SUPREME COURT ON APPEAL. — When an appeal is taken from a territorial probate court to the district court, and the appeal never determined in the district court, this court has no jurisdiction, nor can such jurisdiction be given by consent,

APPEAL from the District Court of the Fourth Judicial District of the State of Nevada, Washoe County, Hon. C. C. GOODWIN presiding.

The facts appear in the opinion of the court.

Clayton & Clarke, for Appellant.

George A. Nourse, Attorney-General, for Respondent.

*By the Court, BEATTY, J.: [*232]

This was an action brought in the probate court of Washoe county to recover possession of real estate. The case was

Opinion of the Court—Beatty, J.

tried in the probate court, and a judgment rendered in favor of plaintiff.

An appeal was taken from the probate court of the county to the district court of the fourth judicial district. While that appeal was pending in the fourth district court, counsel for appellant and respondent entered into a stipulation to the following effect: "The above-entitled cause coming on to be heard in the district court of the fourth district, on appeal from the probate court of Washoe county, it is hereby stipulated by counsel for the respective parties in open court, that without arguing or submitting said cause in the district court, the same be submitted to the supreme court in the same position it now occupies in the district court."

There is no appeal direct from the judgment of a probate court in such cases to this court, but under the territorial law there was an appeal to the district court. Had the district court first decided this case, then either party aggrieved might have appealed from the decision of that court to this court. But the case appears to be still pending in the district court.

The stipulation is in effect to take a cause which is pending in the district court and remove it to this court for trial. This cannot be done. This court, except in a few special cases, has only an appellate jurisdiction, and that appellate jurisdiction from certain courts.

In the case under consideration the jurisdiction of the court can only attach when it has been decided in the district court. Until such decision, this court cannot [*233] more assume jurisdiction *than it could of an original action commenced but not determined in the district court.

As yet, there being no judgment in the district court, there is not, and cannot be any appeal to this court. The clerk will strike this cause from the calendar of the court.

LEWIS, C. J., having been of counsel in the court but did not participate in the hearing of this case.

MARY MAPLES, RESPONDENT, v. SOL. GELLER, ADMINISTRATOR, AND RICHARD RAFFER, APPELLANTS.

[1 NEVADA, 233.]

JUDGMENT BY DEFAULT AFTER ANSWER FILED.—After an answer is filed, judgment cannot be entered by default, although the answer may not be served.

SERVICE OF ANSWER NOT NECESSARY TO GIVE JURISDICTION.—Service of answer is for convenience of plaintiff's counsel and may be enforced by the court, but is not necessary to give jurisdiction of the defendant.

JOINT ACTION—WHEN CANNOT BE MAINTAINED AGAINST MAKERS OF A NOTE.—A joint action *at law* cannot be maintained against survivor and administrator of deceased maker of a promissory note.

ERRONEOUS JUDGMENT—APPEAL.—When an erroneous judgment is entered and there is a motion made in the court below to have that judgment set aside, the appeal lies direct from the judgment and not from the order refusing to set it aside.

APPEAL from the Fourth District Court of the State of Nevada, Washoe County, Hon. C. C. GOODWIN presiding.

The facts of the case are stated in the opinion of the court.

J. C. Foster, for Appellants.

George A. Nourse, Attorney-General, for Respondent.

*By the Court, BEATTY, J.:

[*234]

The facts of this case are as follows: In 1860, Richard Raffer & Co. were doing business as partners at Humboldt, *California. The plaintiff alleges W. H. [235] Stoulev was the partner of Raffer. Raffer & Co. executed their note to Joshua Maples, at their place of business in California, on the 18th day of January, 1860, payable on demand. In the winter of 1860, Joshua Maples died intestate, and, on the settlement and distribution of his estate, this note of Raffer & Co. was turned over by the administrator to the present plaintiff, who was the widow of Maples, deceased. On the 12th of January, 1862, Stoulev, the alleged partner of Raffer, died, and the defendant, Geller, was appointed his administrator on the 7th of April,

Opinion of the Court—Beatty, J.

1862. On the 23d of February, 1863 (plaintiff alleges before the time for presenting claims had expired), a demand was presented to the administrator of Stoule for the allowance of this note against said estate. Whether this demand was accompanied with the proper affidavit, such as required to accompany every demand against an estate of a decedent, does not appear. Nor does it appear by any affirmative allegation that the claim was presented within ten months after the first publication of notice to creditors to present their claims. It was presented about ten months and sixteen days after letters of administration were granted. If the publication of notice followed the grant of letters of administration as promptly as it should have done, then the claim was not presented within ten months. What the facts were on this point the complaint does not distinctly show, but merely that it was within the time appointed by the administrator for the presentation of claims. Suit was brought in April, 1863. The complaint seems to be in fact a joint action against Richard Raffer and the administrator of his deceased partner. It is entitled, "*Mary Maples, relict of Joshua Maples, v. Richard Raffer and Sol. Geller, administrator of the estate of Wm. H. Stoule, defendants.*" It then goes on to state the facts we have herein stated, and winds up with the following prayer: "Wherefore, plaintiff prays judgment against defendants, and that the administrator of the estate of Wm. H. Stoule, pay, in full, in course of administration, the said note with interest as above said, and for such other and further relief as may be just and equitable."

To this complaint the defendant, Geller, demurred, with a few days after it was filed, on two grounds:

[*236] *First. That it did not state facts sufficient to constitute a cause of action.

Second. That it appeared on the face of the complaint that the claim was barred by the statute of limitations. The demurrer was overruled, and ten days given defendant, Geller, to answer. Within the ten days he did file his answer, but failed to serve it on plaintiff's attorneys. One of plaintiff's attorneys came in, and on an *ex parte* affidavit

 Opinion of the Court—Bentley, J.

wer had not been served on his firm, moved for it.

der for judgment generally was made by the judge, judgment was entered up on the 14th day of Jan-64, in favor of plaintiff, against the administrator, to in due course of administration out of the assets of l. Some eleven months after the judgment was entered defendant, Geller, moved to open the default, as argued, and set the judgment aside. This the court to do, and the defendant appeals to this court from judgment rendered in January, 1864. Several errors assigned: that the claim was barred by the statute of limitations; that it was error to enter judgment with an answer on file; that the form of the judgment should have conformed to the prayer of the complaint, etc.

As to the statute of limitations we have not said particularly, and therefore express no opinion on that point.

As to the point that no judgment should have been entered while the answer remained on file and undisposed of, we will not take. The statute requires an answer to be filed; but it does not require that there should be evidence of service on the answer. In this respect it is different from a complaint. The complaint must be served, unless service be waived, and proper evidence of service, or waiver of service, brought before the court, before it will assume jurisdiction of the defendant. When a defendant has *filed* his answer, the court has jurisdiction of the person, and no evidence of service of the answer is necessary to enable the court to exercise all its powers over the parties. The requirement that the answer be served, is for the convenience of the opposite party, and not to confer jurisdiction on the court. [*237] It was not then *necessary*, although it might

be regular, for the answer to show evidence of service on plaintiff or his attorney. If, then, it is not necessary that an answer should show service, the court would not, at first instance, be justified in treating an answer as a default when it did not show service. Nor do we think the

Opinion of the Court—Beatty, J.

court would be justified in doing it upon an *ex parte* affidavit. An absolute personal service of an answer is not required. It may be served by sending by mail, or leaving it at the office of the plaintiff's attorney. The mails frequently miscarry. A lawyer may well overlook a paper on his table, and not be aware such paper ever was there. In such case he might innocently make an affidavit that the answer had not been served, when in fact it had been logically served. It would certainly, then, be a dangerous practice to allow judgments to be entered against defendants on *ex parte* affidavits that no answer had been served, where a sufficient answer was on file; but even admitting there was the most indubitable proof that no answer ever was served, it would be a very harsh method of proceeding against the defendant to give judgment against him when he had a good defense to the action, because the attorney was careless or inattentive to his business. Such practice might benefit careful, vigilant and attentive lawyers, but it certainly would not do justice to litigants, would be calculated to bring courts of justice into odium and contempt. Besides, there is not the slightest reason or necessity for such practice. If a lawyer neglects his duty in the service of an answer, a motion to strike out, unless a copy be served, with the taxing of the costs of motion against the attorney or his client, would correct the error without depriving defendant of his right to a trial of the cause on the issues joined. We think for this cause judgment should be reversed.

There are other branches of this case that we will not touch before sending it back to the district court. The note was a joint note, or a partnership note. The action seems to be an action in debt against the surviving partner and administrator of the deceased partner.

It is hardly necessary to say such an action can never be maintained on a joint note, where one of the makers has died. The action survives against the surviving partner or partners. The representative of the deceased can never be joined with the survivors in an action. If the note be joint and several, the repres-

Opinion of the Court—Beatty, J.

tive of a deceased maker may be sued on the *several* liability of his decedent; but in such case he is the sole party; the survivors cannot be joined with him. So that in no case can the survivors and an administrator be sued in the same action at law upon a promissory note. In equity the rule is somewhat different. Formerly it was held that after the creditor had exhausted his remedy against the survivors, or where they were bankrupt or insolvent, so that no proceeding against them could be made available, he might proceed in chancery against the estate of the deceased partner or joint debtor. Recently the rule has been somewhat modified, and courts have generally held that, in equity, partnership debts (sometimes there has been an attempt to extend the rule to other joint debts) will be treated as joint and *several* debts, and the creditor be allowed to proceed against the estate of decedent as for a several debt due by him. Under this latter rule the creditor is allowed to file his bill praying for payment out of the assets of, deceased, in the hands of his administrator or executor, without any allegation of bankruptcy or insolvency of the survivors; or, indeed, so far as we can see, any special reason being shown why the party has come into chancery when there is apparently a plain legal remedy open to him for the collection of his debt. This seems to be the law settled by modern cases. (See Colyer Part., Sec. 580; Story's Eq. Jur., Sec. 676, and authorities there cited.)

But whilst the law seems to have been so settled, generally in the more modern cases we are at a loss to understand why the former ruling on the subject was changed. The legal doctrine about the liability of the survivor has been settled beyond question for centuries. The partnership property all goes into the hands of the survivor, that he may be enabled to pay the partnership debts and settle the partnership affairs. The administrator of the deceased partner has nothing of the partnership assets until all the firm debts have been paid and its affairs wound up. The surviving partners ought to know *all [*239] about the affairs of the partnership; the administrator of a deceased person can hardly be expected, as a

Opinion of the Court—Beatty, J.

general thing, to know much. These being the rights of the partners at law, we are at a loss to understand upon what principle courts of equity break down the ancient rules in regard to partnership debts. We see no good reason for adopting the new rule on this subject, but many for adhering to the former practice; but if the modern decisions on this subject have been as uniform as they appear to be from the cursory examination we have made of the question, we may not feel at liberty to disregard them. We have made these suggestions because when this case goes back to the court below, if it is possible so to amend the complaint as to show the plaintiff entitled to equitable relief, against the administration of Stoulev, it should contain a statement of those facts (if any such exist) which would remove the doubts we have expressed. Under our system, which attempts to do away with all form, and as far as may be, to abolish all distinction between law and equity cases, it is difficult to say that any form of complaint may not be treated as a bill of equity. But whatever this complaint may be, it is not a bill in equity, seeking to obtain a decree against the appellant upon the ground that his decedent was severally bound for the payment of the note set out in the complaint. And upon that theory alone could the judgment in this case be sustained. It has been suggested by respondent that the appeal was not well taken in this case, because the error of the court did not so much consist (if any error there be) in the original entry of judgment as in the refusal to set aside that judgment; that the appeal should have been from the order refusing to set the judgment aside. In this we think the counsel is in error. The judgment was clearly erroneous. We doubt extremely if the district court could at the time the motion was made have set aside the former judgment. The case was beyond the control of that court, so far as the judgment was concerned. The case is not at all similar to the California case referred to by counsel. In that case the party had a perfect remedy in the court below. Default had been taken without personal service.

In such case the defendant had the statutory right

Points decided.

right *which was absolute, and not depend- [*240] on the discretion of the court) to open the default. The party in default, without seeking to open the case in the court below, appealed. The supreme court decided in effect that they would not look into the alleged errors in entering the default, because if it was entered regularly or irregularly the party without appeal could have the case opened up, and be heard in his defense on the merits, if he had any defense.

Here the party had no such absolute right. Either the judgment was or was not erroneous. If erroneous, the appellant has a right to reversal. If not erroneous, he could only address his application to the favor of the court. The court in such case could at most only have a discretionary power, with which this court would not interfere, except in a case of manifest abuse. We think the appeal was properly taken from an erroneous judgment, and that it was the only appeal the defendant could sustain.

The judgment is reversed, and the cause remanded to the court below. The district court will allow the plaintiff to amend his complaint, and take such other steps in the case as may be consistent with the rules of practice, and not inconsistent with this opinion.

LEWIS, C. J., having been of counsel in the court below, did not sit in this case.



THE STATE OF NEVADA, APPELLANT, v. FRANK TILFORD ET AL., RESPONDENTS.

[1 NEVADA, 240.]

COUNTY OFFICERS—WHO ARE.—The board of education of Storey county prior to the 20th of March, 1865, were "county officers," within the meaning of that phrase as used in the 13th section of Article XVII, Constitution of Nevada.

HOW—WHEN OFFICES MAY BE ABOLISHED.—There are certain county offices designated in the Constitution. These offices cannot be abolished without a constitutional change, nor the incumbents removed prior

cond. Whether Frank Tilford, president of said board, is legally qualified to exercise the office of county superintendent of public schools. Third. Whether Robert H. Taylor and others, who hold appointments as school trustees under said Tilford, are legally qualified to exercise the duties of said offices.

This appears to us somewhat like uniting three distinct questions in one proceeding; but as no exception is taken to this mode of proceeding by either party, and as we can see no evil which will result from settling all three of these questions, we will proceed to examine and decide each one of them.

*In determining the first point this preliminary [*244] question is presented to our consideration: Were the members of the board of education in Storey county, prior to the 20th of March, 1865, county officers in the sense in which that term is used in the thirteenth section of article seventeen of the Constitution? We have no hesitation in answering this in the affirmative. They were elected by the voters of the entire county, and their jurisdiction extends over the whole county. There can be no doubt they were county officers. The term county officers, as used in the thirteenth section of the seventeenth article of the Constitution does not seem to be used in any restricted sense. There might, perhaps, be a plausible argument in favor of the proposition that it only referred to those county officers which are named in the Constitution, and which constitute a part of the framework of our government as established by that instrument.

But we are of the opinion that no such restriction upon the more general sense of these terms can be inferred from anything in that section. If, then, we were not to look beyond the thirteenth section of the seventeenth article of the Constitution, we should say they were county officers, entitled to hold over until January, 1867. But admitting this as a general proposition, can it be contended that they would remain county officers after their office was abolished?

The Constitution provides for the election of county commissioners, county clerks, county recorders, district attorneys, sheriffs, county surveyors, and public administrators.

Opinion of the Court—Beatty, J.

it it provides for the continuance in office of all county officers whose offices may not be legally abolished before the first Monday of January, 1867.

It is claimed for Tilford, that although the board, of which he is or was president, is legislated out of office, still he, as superintendent of public instruction, is entitled to hold and exercise the office of superintendent of public schools; that the difference of a single word in the title of the office, when the duties are similar, does not make it a different office. We certainly are not disposed to question the correctness of this as a general proposition.

The legislature, when legislating in regard to constitutional offices, has not deemed it necessary to adhere strictly to the names given in the Constitution. We believe that an examination of the laws passed last winter [*246] will show that the terms "district attorney" and "prosecuting attorney," have been used indiscriminately to designate the officer called in the Constitution "district attorney." But in the case before us the official powers of superintendent of public instruction were not at all those of the superintendent of common schools under the old law, nor are they those of the superintendent of public schools under the present law. The board of which he was president possessed the most important powers that did and do belong to the superintendent of schools; but it is hardly worth while to discuss the similarity or dissimilarity of the powers of these several officers. Whatever powers Tilford possessed he derived from his position of member and president of the board of education. The board has been abolished, and with it, of course, his membership and presidency. As the office of superintendent of public instruction is merely *ex officio*, derived from and dependent upon the presidency of the board of education, his powers and duties as superintendent ceased when the board was abolished.

It is hardly necessary to add that as Taylor and others, claiming to act as trustees of school districts, were appointed by a board which had been abolished before their appointment, they are not and never have been trustees of the several school districts of Storey county.

Opinion of the Court—Beatty, J.

We have come somewhat reluctantly to these conclusions because the decision is calculated to derange the schools of Storey county; but prompt action on the part of the county commissioners in appointing a superintendent of public and common schools will probably prevent any serious derangement.

The judgment of the court below is reversed, and the case is remanded, with directions to enter up a judgment in accordance with this opinion, removing all the defendants from the several offices by them claimed.

GILLIG, MOTT & CO., RESPONDENTS, *v.* INDEPENDENT GOLD AND SILVER MINING COMPANY, APPELLANT.

[1 NEVADA, 247.]

REMARKS.—HOW SERVED.—Service of summons on a corporation is made by serving a copy of the same on the secretary of the company. Form ok. A jurat in this form is good: "Subscribed and sworn to before me. A. R., Clerk; by C. D., Deputy Clerk."

Appeal from the First Judicial District, State of Nevada, Storey County.

The facts are stated in the opinion.

Williams & Blaker, for Appellant.

W. S. Wood, for Respondents.

By the Court, BEATTY, J.:

This was an action on account. Judgment was entered against the defendant by default. Defendant, without seeking to set aside the default, appeals to this court.

The questions raised are: Was there such service of summons as entitled the plaintiffs to the judgment entered by default? The service was made by *W. S. Wood*, by delivering a true copy of the summons to the secretary of the company, and showing him the original. It is objected that this summons was not

Opinion of the Court—Beatty, J.

ed, because the original was not read to the secre-
e practice act of 1861, section twenty-nine, provides
ice on a *corporation* shall be by delivering a copy
resident, or other head of the corporation, secre-
ier, or managing agent thereof." A law of 1862,
to the manner of serving and rendering judgments
companies of a certain character, contains this clause:
uits against any company organized for mining pur-
: against any company transacting business or
n office within this territory, service may be made
g and delivering a copy of the summons to the
, secretary, cashier, or managing agent thereof, and
such service cannot be had, then by publication,
rovided by law."

be seen that by this latter act service *may be made*
companies of a certain description by serving a copy
ng the original summons to certain officers, etc.
vision refers to companies whether incorporated or
e main object of the law would seem to have been
a defect in the general law. That law sufficiently
for serving corporations, but was defective in pro-
r serving mining companies, etc., which were not
ated. The latter law does not profess to repeal the
aw, nor is it in conflict therewith. It is true the
pany is broad enough to include corporations, but
es no conflict between the laws. In serving a com-
; incorporated, it would be proper (we presume
) to follow the act of 1862, and both serve a copy
the original summons. In serving a corporation,
be sufficient to simply serve a copy, as provided in
f 1861. If, in addition to the service of the copy,
aal summons was read, it could do no harm.

ve no hesitation in saying the proof of ser- [*250]
ood. The only objection to the proof is
jurat to the affidavit of service is claimed to be de-
The jurat is in this form:

scribed and sworn to before me this 11th day of
r, 1864.

L. HERMANN, Clerk,

"By B. H. Hereford, D. C."

Points decided.

an inch in every five feet, which will be ample for all rain."

It cannot be claimed that this road is a macadamized road for half of the distance it has not the semblance of a road. Whilst the court is reluctant to come to a decision which deprives Mr. Curry of his labor and expenditure it cannot, without a violation of all principle, and in the event of wrong, allow a party who enters into an agreement with the State to perform one-half or one-fourth of the work which he is legally bound to perform, and then claim the whole as if he had performed the whole.

It must be entered in favor of the State, depriving Mr. Curry of the franchise by him claimed, and forbidding him to collect tolls on the road named.

J. J., did not participate in this decision.

GREGORY, RESPONDENT, v. PETER FROTHINGHAM ET AL., APPELLANTS.

[1 NEVADA, 253.]

ON APPEAL FROM ORDER GRANTING A NEW TRIAL.—In appeals from an order granting or refusing a new trial, a statement on *appeal* is necessary. This court, without such statement, will consider "the *motion for new trial*, the pleadings, depositions, documentary evidence on file, and minutes of the court."

DECLARATION OF VENDOR.—The declarations of a partner or partner in a mill which is building, who deeds his interest in the real estate to his partner, but continues in possession, controlling the property before the deed was made, may be taken in connection with his continued possession and control of business to show his continued ownership of the property.

DECLARATIONS OF A VENDOR, made before the sale, of his intention to transfer to delay his creditors, will be taken as evidence of *his* intent in making a sale, but a knowledge of that intention must be shown to the vendee to avoid the sale.

ESTABLISH FRAUD.—To establish fraud the motives and intentions leading to the transaction may be proven.

RESIDING SURPLUS MATTER.—When the verdict of a jury contains a surplus matter, the court ought not for that reason to set it aside and grant a new trial, unless it appears from that surplus matter that the verdict is based on absurd reasoning or false premises.

Opinion of the Court—Beatty, J.

[*254] *APPEAL from the Second Judicial District of the State of Nevada, Ormsby County, Hon. S. H. WRIGHT presiding.

The facts are stated in the opinion.

Baldwin & Hillyer, and the Attorney-General, *Geo. A. Nourse*, for Appellants.

Clayton & Clarke, for Respondent.

[*256] *By the Court, BEATTY, J.:

This was a suit in the nature of an action of ejectment, to recover the possession of a certain piece of real estate, and the improvements thereon, consisting, among other things, of a quartz mill driven by water power. The mill was constructed by a company conducting business under the firm name of Sperry & Co. J. A. Sperry and Thomas McFarland owned between them a half interest in the mill property. N. Shiverich and E. P. Whitmore owned the other half. It does not appear very clearly from the testimony whether Whitmore had an absolute interest in the property, or only a mortgage on the one-half held by Shiverich. When the enterprise was first started, one-half interest in the real estate stood in the name of J. A. Sperry; but it is clearly shown by the testimony that the half of this half interest was held in trust by Sperry for McFarland. Whilst the mill was being constructed, the firm of Sperry & Co. became greatly embarrassed, and indeed utterly insolvent, as was afterwards shown. Whilst the firm was thus embarrassed, Sperry conveyed his half interest—or rather that half interest which appeared by the record of deeds to be his—to Thomas McFarland. McFarland very soon conveyed the same interest to the plaintiff, Henry Gregory. The defendants in this suit being creditors of Sperry & Co., obtained judgment against them. They also became the purchasers of other judgments and claims against Sperry & Co. They finally became the purchasers of the property in dispute under some of the judgments. These judgments were all obtained after the conveyance to Gregory of a half

Opinion of the Court—Beatty, J.

erest in the mill site, etc., by McFarland. The defendants, under their sheriff's deed, entered into possession of the premises in dispute. The plaintiff brought his suit for possession of an undivided half of the property. The defendants aver that the deed from McFarland was only made to hinder and delay creditors, and was therefore fraudulent and void as against them, they being creditors.

In the judgments had there was no service except on Sperry. The judgments were against him and against the joint property of J. A. Sperry and his associates in the firm of Sperry & Co. *Those associates are all [257] alleged to be McFarland, Shiverich and Whitmore.

Upon the trial of the case the plaintiff showed his chain of title from Sperry and McFarland. The defendants introduced evidence to show their judgments and their purchase and deed of the sheriff thereunder—to show who were the parties composing the firm of Sperry & Co., the insolvency of that company, and the illegality of the sale from McFarland to Gregory. The case was submitted to the jury, under the instruction of the court, who brought in the following verdict: "We, the jury, viewing the deed in the form of a mortgage, find the defendants entitled to recover generally."

Upon this verdict a judgment was rendered for the defendants. The plaintiff moved for a new trial, which was granted by the court below. The defendants appeal from the order granting a new trial, and assign as error that the court below erred in granting that order. The plaintiff contends that the court below committed at least three errors in the progress of the trial, which could only be corrected after the discharge of the jury by granting a new trial, and therefore the court below did not err in so ordering. It was hardly contended in the argument that the evidence in the case would not have justified a verdict for the defendants, or that the court would have been justified in granting a new trial, if there had been no erroneous rulings as to evidence, and the verdict of the jury had been in the usual form of a general verdict.

The errors in the progress of the trial complained of by the appellant are these:

Opinion of the Court—Beatty, J.

First. Admitting the declarations of A. S. Sperry [J. A. Sperry] made against plaintiff and in favor of his own interest.

Second. Admitting the declarations of McFarland, made prior to his conveyance to Gregory, evidencing his fraudulent intentions.

The third ground of complaint on the part of respondent is that the verdict found by the jury is contradictory, and could not sustain the judgment against the plaintiff. This third ground of complaint, as we have stated it, is not by any means in the language of the respondents, but it clearly

shows the point made by them on the argument.

[*258] *The appellants contend that the first two points made by respondent cannot be considered by this court, because the statements on motion for new trial and on appeal are not such as to bring these points before this court.

The plaintiff (respondent) in making his statement on motion for new trial, seems to have embodied the evidence of the witnesses therein; but in stating the facts of the case omitted to make any mention of the exceptions taken in the progress of the case, to the rulings of the court, in admitting and excluding evidence.

Appellants, in their amendments to the statement, ask that the notes of a shorthand reporter, who was employed to report the evidence in the case, should be substituted in the place of the testimony as stated by respondent. The amendment proposed that the reporter's notes of the testimony *only* (thus omitting his notes of the exceptions taken to the rulings of the court), should constitute the part of the statement which was amended. The court settled the statement on motion for new trial, so that it only contained a statement of the testimony and not of the rulings of the court on the admission and rejection of the testimony. Nevertheless, as appears by the minutes of the court made during the argument of the motion for new trial the court did, in deciding that motion, consider all the exceptions which appeared by the reporter's notes to have been taken during the progress of the trial.

To the ruling of the court in considering these points of exception appellants excepted.

Much time was consumed on the argument of this case in discussing the question as to whether these exceptions in regard to admission of testimony should have been considered in the court below, and whether we can, in this court, consider them as affording any ground for the action of the district court in deciding this motion for a new trial.

Our practice act (sec. 195) provides what shall be done by the party moving for a new trial. It not only provides for the making and settling of a statement, but further provides that "on the argument reference may also be made to the pleadings, depositions and documentary evidence *on file, and to the minutes of the court." [*259] This sentence seems clearly to convey the idea that the matters therein mentioned need not be contained in the statement for new trial. And it appears obvious to us that there is no necessity for those things to be embraced in the statement. The motion is usually heard by the judge who tries the case. It is usually, or at least it should ordinarily, be disposed of soon after the trial. The presiding judge must know what depositions, etc., were used on the trial. The minutes of the clerk and his own minutes of exceptions, aided by his recollection of what has recently taken place at the trial of the cause, are sufficient to enable the judge to rule intelligibly on all the points that may arise before him, without the necessity of a formal statement embodying all the exceptions which were taken on the trial. It appears to have been contemplated by the code that the statement *on motion for new trial* should contain only a statement of the grounds on which the moving party intends to rely, and so much of the oral evidence as relates to those grounds.

For the written evidence, rulings of the court, exceptions, proceedings during the trial, etc., the party is allowed to refer to the pleadings, depositions, exhibits on file, minutes of the clerk, notes of the judge as to exceptions, etc.

The 248th section, in regard to appeals, provides that on appeal from a final judgment the appellant shall furnish the court with copies of the "notice of appeal, the judg-

Opinion of the Court.—Beatty, J.

ment-roll and the statement annexed (if there be one), certified by the clerk to be a correct copy;" whilst on appeals from an order the appellant is only required to furnish a copy of "the notice of appeal, * * * order appealed from, and a copy of the *papers used in the hearing* of the court below, such copies to be certified by the clerk to be correct." It would seem, then, that the code does not contemplate a *statement on appeal* when the appeal is from an order sustaining or overruling a motion for a new trial. Consequently a statement on appeal, which should contain only a part of the papers referred to on the motion for new trial, would not preclude us from examining those not contained in or referred to in such statement. When the

clerk certifies that a transcript contains copies of [*260] certain *depositions, exhibits, minutes of the clerk, notes of the judge, etc., which were used on the hearing of the motion, and they seem to be pertinent to the grounds set forth in the statement for new trial, we will consider them in this court. A statement on appeal, made by the appellant, and agreed to by the respondent, or even settled by the judge (on proper notice to respondent), might be a guide to the clerk in making out the transcript, and might frequently save a heavy expense to the parties, and much trouble to the court by shortening the transcript, omitting some papers entirely, merely giving a short abstract of others, such as deeds, etc., about which there is no question.

But the law does not require or expressly sanction such statement, and when it is made without notice to the respondent, it will not exclude him from the use in this court of any paper referred to in the *argument* in the court below. In settling such statements, but one common-sense rule could be adopted: to let into the statement or transcript every document, order of court, minute of the clerk, or note of the judge, which either party might deem material to the protection of the interests of his client. Under such a rule, lawyers will, no doubt, in their anxiety to omit nothing that could by possibility be useful to their clients, frequently *insert* useless matter. But it is better this should happen *than* that parties should be deprived of the privilege of

Opinion of the Court—Beatty, J.,

g those facts which they and their counsel believe
 ant and essential to protect their rights. We have
 ed these opinions about a matter of practice, in the
 at they may serve as a guide to practitioners here-
 making up transcripts. The principles we have
 here do not, however, remove all the difficulties of
 se. The statute provides for a reference "to the
 of the court." Do the reporter's notes constitute
 of the court? Bouvier defines minutes to be "a
 andum of what takes place in court, made by au-
 of the court." The order made in this case seems
 been to appoint a reporter to take down the evi-
 He did, however, take down not only the evidence,
 rulings of the court in relation to admission and
 n of evidence and the exceptions of counsel.

r these notes should, *under such circum- [*261]

be considered as memoranda made by the
 y of the court, and therefore constituting a part of
 utes of the court, is a question on which this court
 ed in opinion, and upon which it is not necessary at
 e to make any ruling.⁽¹⁾

irst point of respondent is that the court below
 the progress of the trial in admitting evidence of
 arations of J. A. Sperry. Assuming for the present
 may look into this alleged error, let us see what was
 re of the evidence, and under what circumstances it
 itted. Sperry, as we have seen, held one-half of
 perty in his name, but as is shown by the most sat-
 y and uncontradicted evidence, he held one-half of
 f interest for McFarland.

the company is embarrassed and insolvent he deeds
 f to McFarland. After the deed he remains in pos-
 and exercises the same control over the property
 did before, and whilst he was thus in possession ex-
 control over the property, he made certain declara-
 out how he held the property; that is, that he held
 t owner with McFarland. The fact that he did con-

⁽¹⁾ *In State v. Larkin*, 11 Nev., that the reporter's notes could not be considered as
 "the minutes of the court."

Opinion of the Court—Beatty, J.

tinue to occupy it was in itself a suspicious circumstance. When one sells real estate and retains possession merely to gather crops, to remove furniture, or in dwelling-house, store, or warehouse, or other place which could be applied to a useful purpose, should he rent it from the vendee, the circumstance might not be suspicious; but if one sells his entire interest in a grist-mill, which cannot be applied to any other purpose, and retains possession just as before the sale, the circumstance is suspicious. If he retains possession and continues on with the work at the mill, and declares himself interested, it is very strong evidence of the fact that the sale was only colorable, and we think his declarations in connection with his possession may be received as a *res gestæ* to show what was the nature of his possession and interest in the property. We think the court below erred in admitting proof for that purpose. This fact did not amount to anything. There was no question for the jury as to fraud or *bona fides* of the sale. [*262] Sperry to McFarland; but in making out the case of circumstances to show fraud in the sale of the mill to Gregory, it was thought advisable on the part of the defendants to show that up to the time of the sale, there was no real change in the interest held by Sperry and McFarland in the property; that at first Sperry was in his name, the interest belonging to himself and McFarland, and afterwards McFarland held the same interest in the mill, but that the beneficial interest was all the time divided between them. We think this fact was material in the case, and of evidence, and we think it was proved in a proper manner.

The next complaint in regard to the admission of evidence is that the judge below should not have permitted Gregory to prove the declarations of McFarland that he had no interest in the mill and was negotiating a mere colorable sale of his interest in order to obtain time to meet his liabilities of the firm. We think this evidence was properly admitted. To prove fraud you must prove the *intentions* of two parties. These declarations were

mate evidence to prove the intentions of McFarland. Gregory's motives had to be proved by other circumstances with which he was connected. As to the rule of admitting the declarations and acts of the vendor made and done before the sale to prove *his* fraudulent intent, see the case of *Laneker v. Houghtaling*, 7 Cal. 392, and authorities there cited.

This leaves for our consideration the question as to how the verdict of the jury should be construed. We think the verdict is a good general verdict, and the words "viewing the deed in the form of a mortgage," are mere surplusage, and do not affect the verdict in any way. Striking out these words, the verdict reads: "We, the jury, find the defendants entitled to recover generally." This, though not exactly in the usual form of a verdict for defendants, is certainly a good verdict. Surplusage in a verdict does not vitiate it. If that surplusage showed clearly that the jury had reasoned incorrectly, or that they had come to their conclusion from false premises, then, indeed, would it present to the court a strong reason for setting aside the verdict. But even then, if it was apparent beyond all question that the verdict was itself right, though the reasoning on which it was based was absurd, we should doubt extremely *the [*263] propriety of granting a new trial. It is generally satisfactory to a court when a jury finds a correct verdict.

If they were in all cases required to give a good reason for their action, it would, we fear, lead to many new trials and endless litigation. In this case, the evidence is very strong in support of the verdict found by the jury. As to the language used by the jury in attempting to explain their verdict, literally construed, it is nonsense. They say, "Viewing the deed in the *form* of a mortgage." The deed is in the transcript, and is not in the *form* of a mortgage, but in the *form* of an ordinary deed of bargain and sale. So the jury did not mean what they say—that the deed was in the form of a mortgage. Then if we wish to know what they did mean, we must look at the history of the case, and at the evidence before them. Gregory professed to have bought the property. He did not pretend to have paid a dollar, but to have settled indebtedness due to himself to

Opinion of the Court—Beatty, J.

the amount of about two thousand eight hundred and fifty dollars, and to have executed his notes to McFarland for seven thousand one hundred and fifty dollars. These notes, soon after the transaction, or indeed at the very time almost that they were delivered to McFarland, came back into the hands of Gregory (for safe keeping, he says), and were afterwards again delivered by Gregory to McFarland, if we are to take Gregory's word for it. But Gregory admits that he has not seen or heard of these notes since he delivered them to McFarland the second time. He has not paid, or been called on to pay, a cent since that time on these notes. It is also in proof, by one witness at least, that McFarland declared his intention to put his property in the hands of some one to hold for him until he could get time to pay or arrange with his creditors. It is also proved, by the same witness, that proposals were made to defendants to accept such a trust, and he was told that by so doing he could secure his debts (which were otherwise of doubtful value) against Dye & Smith and McFarland.

With all these facts before them, we think the jury came to the very sensible conclusion that Gregory only accepted the deed for the purpose of trying to secure his two thousand eight hundred and fifty dollars of doubtful debts; that [*264] the notes *which he executed, and which were immediately redelivered to him, were a mere sham—he did not intend to pay them. McFarland did not expect to collect or use the notes. They probably thought that the real transaction was, that this deed should stand as a mortgage or security for the two thousand eight hundred and fifty dollars, as between the parties, but should appear on the record as an absolute sale for ten thousand dollars, in order to hinder and delay creditors. If these were the views of the jury, they coincide fully with those entertained by this court.

We think that the language complained of does not indicate that the jury misunderstood the facts, or reasoned falsely from the facts proved; but when they attempted to give a reason for their verdict, they failed to express themselves with clearness and precision. For this we think the

Opinion of the Court—Beatty, J.

verdict should not have been set aside. The order of the court below, granting a new trial, is set aside and reversed. The original judgment of the court below in favor of defendants is reinstated and affirmed.

THE STATE EX REL. NIGHTINGILL, PETITIONER, v.
BOARD OF COMMISSIONERS OF STOREY
COUNTY, RESPONDENT.

[1 NEVADA, 264.]

TAXATION—SECTION 24, ARTICLE XVII, OF THE CONSTITUTION CONSTRUED.—Section 24 of Article XVII of the Constitution prohibits taxation beyond one and one-quarter per cent. for State purposes during the first three years of its existence.

ITEM—SECTION 3, ARTICLE IX, OF THE CONSTITUTION DISCUSSED.—Section 3 of Article IX discussed and commented on. It does not qualify the 24th Section of the XVIIth Article.

UNCONSTITUTIONAL LAW—WHEN BONDS NOT AFFECTED BY.—Tax levied under the law in question is illegal and void, but the bonds authorized to be issued are legal and valid debts against the State if negotiated.

THIS petition for a mandamus was an original proceeding in the Supreme Court.

The facts are stated in the opinion.

Clayton & Clarke, for Petitioner.

D. Corson, District Attorney of Storey County, for Respondent.

*By the Court, BEATTY, J.:

[*265]

The legislature of the State of Nevada, at its last session, passed a law for the issuance and sale of State bonds to the amount of one hundred thousand dollars, to raise a fund for the purpose of encouraging enlistments and paying bounties, etc., to volunteer soldiers. The same act provides that a tax *of twenty-five cents on each one [*266] hundred dollars' worth of taxable property shall be levied to pay the interest and principal of this debt. By a general law of the State the county commissioners of each

Opinion of the Court—Beatty, J.

ent when we come to examine subsequent sentences in this section.

[*268] *The second sentence is in these words: "Every such debt shall be authorized by law for some purpose or purposes to be distinctly specified therein; and every such law shall provide for levying an annual tax sufficient to pay the interest semi-annually, and the principal within twenty years from the passage of such law, and shall specially appropriate the proceeds of said taxes to the payment of said principal and interest; and such appropriation shall not be repealed, nor the taxes be postponed or diminished until the principal and interest of said debt shall have been wholly paid." Taking this sentence *only* in connection with the first, and it would seem the legislature might borrow three hundred thousand dollars for ordinary purposes and in any manner they saw fit. They might borrow any sum beyond three hundred thousand dollars for extraordinary expenses; but if the borrowing was for extraordinary expenses, two things were necessary to be done as conditions precedent to the borrowing:

First. The act authorizing the creation of the debt must specifically mention the purpose or purposes for which it is to be created.

Second. It must provide a specific tax especially set apart for that debt, sufficient in amount to pay the interest semi-annually, and extinguish the principal within twenty years. If these conditions precedent are performed, then it would appear that the indebtedness might be incurred for any object of extraordinary expense which the legislature are not specially prohibited in other sections from incurring. There would be no difficulty in interpreting this section if it only contained these two sentences.

The third sentence is in these words: "Every contract of indebtedness entered into or assumed by or on behalf of the State, when all its debts and liabilities amount to said sum before mentioned, shall be void and of no effect, except in cases of money borrowed to repel invasion or suppress insurrection, defend the State in time of war, or hostilities be threatened, provide for the public defense."

This sentence, taken literally, excludes the possibility of allowing the State debt in any instance to exceed three hundred thousand dollars, unless the excess be created for the *purpose of *repelling invasion, sup- [*269] pressing insurrection*, etc. If such is the meaning, then the conditions precedent to the borrowing money for *extraordinary expenses*, as mentioned in the second sentence, has reference only to money borrowed for the purpose of being used to repel invasion, etc. The language of the whole section is capable of such interpretation, and possibly such was the intention of the convention. Yet it would appear absurd to allow the legislature to borrow three hundred thousand dollars for ordinary purposes, without any restrictions as to the mode of providing for its payment, and yet deny to them the right to borrow a single dollar for the defense of the State, in case of the most sudden emergency arising from invasion, insurrection or war, until the legislature had first considered and devised the ways and means to pay debt and principal, and passed the necessary law for raising those means. It is, to say the least, an extraordinary limitation on legislative powers.

Whether the convention meant to provide for two or three classes of State debts it may not be necessary to determine in settling this question. It may have been intended to provide for three classes of debts:

First. Three hundred thousand dollars, with no restriction as to the manner or time of borrowing or paying.

Second. Debts for any extraordinary expense, not to be contracted except upon the conditions precedent, that the act authorizing the debt should specify the purposes for which it was contracted, and provide the necessary taxation to pay semi-annual interest and extinguish the principal in twenty years.

Third. Debts contracted to repel invasion, etc.

If it was intended to provide for three classes, doubtless it was intended that the legislature should be as unrestricted in the mode and manner of contracting the third as the first-named class of debts. But it may have been the intention of the framers of the Constitution to provide for

Opinion of the Court—Beatty, J.

only two classes of debts. The first-class of three hundred thousand dollars, as we have mentioned; the second-class of debts for such *extraordinary expenses as might be incurred in repelling invasion, etc.*

[*270] *If the Constitution provides for only two classes of debts, the conditions precedent above mentioned apply to this second class only. If this section provided for three classes of debts, there is no pretext for claim of conflict between its provisions and those of Section 24 of Article XVII. The State might borrow any amount of money for defense against invasion, insurrection or other hostilities without interference with the limitation on taxation referred to. That limitation on the right of taxation would not materially impair the credit of the State or lessen its ability to borrow, if it made a pledge of future taxation resources.

If, however, the Constitution provides for only two classes of debts, then no money to protect the State, even in the most urgent necessity, can be borrowed (after the hundred thousand dollars limit has been reached), without providing the means to pay all, principal and interest, within twenty years. And it is argued that the State cannot now do anything to repel invasion, etc., without coming into conflict with Article XVII, Section 24; that the one dollar and twenty-five cents per cent. allowed by that section to be levied on all property is appropriated to special purposes, and cannot be set aside for payment of interest, etc., on money borrowed for defense against invasion; and that it could not have been the intent of the convention to so tie up the State and render it helpless for three years. The premises in this argument are altogether correct. The whole one dollar and twenty-five cents of taxes allowed by section 24, to be collected for special State purposes, are appropriated for this year, and if no other two classes of debt are provided for, it would be impossible before the first day of January next, to borrow any money for defense of the State without exceeding the one dollar and twenty-five cents limitation in section 24. This limitation of things would not necessarily continue three years. Ninety-five cents of the one dollar and twenty-five cen

Points decided.

under the entire control of the next legislature (if the debt for which it is pledged is paid this year, as it probably will be), and they may, if any emergency arises, set apart the whole or any portion of that ninety-five cents on the hundred dollars to pay interest, and gradually extinguish the principal of a debt contracted to repel invasion or suppress insurrection. *They could leave the [*271] ordinary expenses of the government to be paid by poll taxes, license taxes, and borrowing within the three hundred thousand dollars, etc. The whole argument seems, however, better calculated to throw doubt upon the correctness of the policy which governed the convention, than upon their intentions as expressed in the limitation on the taxing power. The limitation in Section 24 of Article VII of the Constitution is expressed in the broadest and most comprehensive language. Although Section 3 of Article IX is somewhat obscure in its meaning, we see nothing therein which necessarily restricts the operation of the section in Article XVII just referred to. So much of the law under consideration as provides for the levy of the twenty-five cent tax, is unconstitutional and void. This, however, does not affect the validity of the bonds. The money attempted to be raised was for a legitimate purpose—one for which the legislature might lawfully appropriate money. It does not appear that the legislature has passed the limit of three hundred thousand dollars; and they have not passed that limit, the bonds, if negotiated, would be a binding debt on the State, to be paid as any other liability. The defendants were right in the course they pursued. The mandamus is dismissed with costs.

W. MAYNARD, APPELLANT, v. C. W. NEWMAN,
ET AL., RESPONDENTS.

[1 NEVADA, 271.]

DEF.—To coin money means to fabricate it out of metallic substances. Money is anything which passes current as a general medium of exchange and measure of values. Paper money is different from negotiable securities.

Opinion of the Court—Beatty, J.

¹ CONGRESS HAS POWER TO ISSUE TREASURY NOTES.—The power of the National Government to issue treasury notes is not derived from the special power to coin money, but is an incident to the more general powers of the Government.

HOW LAWS SHOULD BE INTERPRETED.—In interpreting laws, the intention of the legislative body will be carried out, and it will not be lightly presumed that the law-making power contemplated the law should be used as a cloak for fraud and oppression.

[*272] *APPEAL from the First District Court of the First Judicial District of the Territory of Nevada, Storey County, Hon. J. W. NORTH presiding.

The facts appear in the opinion.

Thomas Sunderland, for Appellant.

Reardon & Hereford, for Respondents.

By the Court, BEATTY, J.:

The defendants, Newman and A. C. Hamilton, in May, 1862, executed and delivered a note in the following words:

“Six months after date we, or either of us, promise to pay to the order of John R. Harrold ten thousand dollars, for value received.

“C. W. NEWMAN,

“A. C. HAMILTON.

“GOLD HILL, May 1, A. D. 1862.”

This note passed by assignment to plaintiff, and he obtained judgment against the defendants for nine thousand eight hundred and nineteen dollars and sixty cents—the amount of the note and interest, less a payment of one thousand one hundred dollars made thereon before suit.

[*273] After judgment *defendants tendered to plaintiff the full amount of debt, interest and costs, in United States legal tender notes. The plaintiff refused to accept them in payment of the debt. The defendants then paid them into court, or paid them to the clerk of the court wherein the judgment was rendered. Upon proper notice, the plaintiff was brought into court, and again refused to accept the legal tender notes in payment of his debt. The

Opinion of the Court—Beatty, J.

then, on motion of defendants, ordered the clerk to enter the judgment as of record. From this order the defendants appealed, and the only point made before this court was that the law of Congress of the 25th of February, 1862—relating to legal tender notes—is unconstitutional and void. In determining this question it may not be unprofitable to revert to the history of the formation of the Government prior to the adoption of the present Constitution. Prior to the year 1775, the territory which was embraced within the United States Government constituted a part of the British Empire. This territory embraced many distinct municipal corporations, each having a local government, and exercising certain local and municipal authority, but all acknowledging the supremacy of the British Government, and making no claim to sovereignty. In 1774, Congress, consisting of delegates appointed by and representing most of the thirteen colonies, met for the purpose of devising means for the redress of certain grievances which they complained. In 1775 an organized resistance was made to the British authority, and in the following month, July 4, 1776, the thirteen colonies declared their independence of Great Britain. The inauguration of resistance, the organization of armies, the declaration of independence, the sending of commissioners abroad to seek foreign aid, were all acts of Congress—a body of deputies elected or appointed by the separate states or municipalities, but still acting as the whole body of States as one nation or one people. None of the colonies, so far as we are aware, ever declared its independence of the mother country. That act was the act of all. The different colonies raised regiments of militia within their own jurisdiction, but when placed in the field they were under the command of *generals [*274] appointed by the central government. At the beginning of the Revolution there was no written law or constitution defining or limiting the power of Congress. The Government had no courts, and no civil ministerial officers; in fine, no machinery for carrying its laws, decrees and resolutions into effect. All laws had to be enforced by the machinery furnished by the municipal governments of

Opinion of the Court—Beatty, J.

the respective colonies. They were obeyed and enforced as decrees of revolutionary tribunals are usually enforced, by the universal consent of the revolutionary party, and the general belief that any failure to implicitly obey such mandates would cripple the efforts of the revolutionists, and restore the former government to power.

At the very outset of the controversy with the mother country, it was foreseen if a separation took place some form of government must be adopted for the seceding territory. Not a government for each of the colonies, but a government for the whole. After considerable delay, Congress, in the month of November, 1777, finally adopted a written Constitution (usually called "Articles of Confederation") for the government of the new nation then struggling into existence. This was submitted to the different colonies for their ratification.

This was approved by the different colonial legislatures from time to time. We believe most of them had approved it by the summer of 1778; but one State, Maryland, did not approve it until the year 1781.

But Congress conducted its business in accordance with the general provisions of that instrument both before and after its approval by the separate colonies. That instrument shows as near as may be the original form of government adopted by the people of this continent when they threw off their allegiance to Great Britain.

Whilst the articles of confederation show that most of those powers which are the usual attributes of sovereignty were vested in the central government, in one particular the United States government, as then constituted, was entirely defective as to its sovereign power. That government could not enforce its laws against individuals.

[*275] *When Congress passed a resolution it must call on the State authorities to enforce it. If the States neglected their duty the government had no way to compel obedience to its mandates, unless it were to make war on the refractory State. Private citizens were not responsible and amenable to the laws of the United States. Under this state of things the States generally obeyed (at least partially) the orders of Congress during the war.

Opinion of the Court—Beatty, J.

At the conclusion of peace the States became negligent or refractory, and in many instances utterly disregarded the resolutions of Congress. It was evident to all that a government of this kind must fall to pieces as soon as the outside pressure of war and foreign difficulties was withdrawn.

A constitutional convention was therefore called to create a stronger and better regulated government for the new State.

That convention adopted a preamble in these words: "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

The convention then went on to confer on the United States government all the principal powers it had possessed under the articles of confederation; such as making peace and war, sending and receiving ambassadors, raising and maintaining armies and navies, etc., and expressly prohibiting these powers to the States. Besides these general powers, courts were organized, and all the machinery provided for enabling the government to enforce its own laws without having to place itself in the humiliating position of beseeching the different States to carry its orders into effect. Under this Constitution the United States became a real sovereignty. The States, it is true, are commonly called sovereign States, but we are at a loss to know in what their sovereignty consists. They can neither make war nor peace, send nor receive ambassadors, yield up nor acquire territory, nor protect their own citizens from seizure, trial and condemnation by the general government for offenses against its laws. It appears to us as absurd *to [*276] talk about the sovereignty of a State where another government has the right (we speak not of those acts which a stronger State may by force and violence exert towards a weaker neighbor)—the legal right to seize any of its citizens and subject them to trial. It is, however, useless to cavil

Opinion of the Court—Beatty, J.

about terms. We have only alluded to the general powers of the Federal and State governments, in order that our views about the intent and effect of the constitutional provisions we shall have occasion to review may be the more readily understood.

We have already seen that the preamble of the Constitution recites that it (the Constitution) is ordained and established, among other things, to “provide for the common defense” and “promote the general welfare” of the people of the United States. It goes on to provide for a legislative department of the government, the mode of electing members to the two houses of Congress, manner of passing bills, etc., and then in section eight shows what shall be the powers of Congress. Section 8, as *usually* printed, reads as follows:

SEC. 8. The Congress shall have power to lay and collect taxes, duties, imposts and excise, to pay the debts and provide for the common defense and general welfare of the United States, but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several States; and with the Indian tribes;

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post-offices and post-roads;

To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the supreme court;

To define and punish piracies and felonies committed *on the high seas, and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriations of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings; and

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

Section 9 of Article I of the Constitution limits the powers of Congress.

Section 10 limits the powers of the States.

These, perhaps, are all the clauses of the Constitution which we will be called upon especially to examine in this investigation.

It is claimed by respondents that the clause which gives Congress power "to coin money, regulate the value thereof," etc., confers on that body the right to emit treasury notes and make them a legal tender.

*We have long *disquisitions* by counsel on each [*278]

Opinion of the Court—Beatty, J.

side of this question (we speak in general of counsel who have prepared briefs on this *subject*, and which have been laid before us, although some of them are not cited in this particular case), as to the meaning of the words “coin” and “money.” We have no hesitation in saying that to “coin money” means to fabricate it out of raw materials or substances. To emit stamped paper is not to *coin* money, as the word is generally understood, nor as we think it is used in the Constitution.

On the other hand, we think *money* means anything that passes current as the common medium of exchange, or measure of value for other articles, whether it be the issue of private or incorporated banks, government bills of exchange, treasury notes, or pieces of coined metal. Money is that thing which, by law, usage, or common consent, becomes the general medium by which the value of other commodities is measured and denominated.

Paper money is distinguishable from other negotiable paper, such as notes, bills of exchange, etc., because it is always (after once put in circulation) payable to bearer, and not to order; because it is made to represent conventional amounts for the ordinary transaction of business, is printed and written on paper not easily worn out, and is durable and capable of being passed from hand to hand for a long time without destruction. By general consent it is usually treated as money, and not as negotiable paper. One who indorses his name on such note he does not thereby become responsible for the insolvency of the bank, but merely certifies that the note is not a counterfeit. Neither the courts nor the law nor the community treat such paper as negotiable securities, but as *money*; something which is used as a general representative and measure of values.

But whilst we do not think that the power to “coin money” gives the power to print, fabricate or issue paper money, we have no doubt that this power exists as an incident of the general powers of the national government. In the case of *McCulloch v. State of Maryland*, the question was raised whether the United States had the constitutional right to charter a United States bank.

Opinion of the Court--Beatty, J.

The power of the government to charter such an institution *was sustained by the unanimous opinion [*279] of the supreme court, at that time presided over by Chief Justice Marshall, a man of great purity of character, and probably the ablest jurist ever produced in the United States. He, in his opinion, sustaining the action of Congress in this case, clearly admits that there is no *express* grant of power to Congress to charter a bank, but ably argues that if the federal legislature is empowered and required to "levy and collect taxes, to borrow money, to regulate commerce, to declare and conduct a war, to raise and support armies and navies," and conduct generally all the external and many of the internal affairs of a great nation, it must, from the very necessity of the case, have the power of selecting the means to carry out these great powers.

That Congress having determined that a bank was necessary to the management of its fiscal affairs, it was therefore constitutional to charter such an institution to facilitate those operations. That the power to charter the bank resulted from the general nature of the express powers granted to Congress.

We think it would be difficult to show why, if Congress may charter a National bank, to facilitate the transaction of its legitimate affairs, it may not make treasury notes for the same purposes; and if it issues treasury notes, why it may not give to them such character as it sees fit. The same object is attained by the bank and the treasury notes. The government is enabled to conduct its financial affairs more successfully with these aids than it can without them. We think, then, we might rest this case on this proposition: That Congress has heretofore exercised a power precisely similar to the one under consideration, and their action has been sustained by the highest judicial tribunal in the country, and this should no longer be considered an open question. But if it were an entirely new question, we would have no doubt on our minds as to the power of Congress. We have no access to many of the books we would like to examine in connection with this subject; but we propose, with

Opinion of the Court—Beatty, J.

such aids as we have before us, to look into the views of the framers of the Constitution in regard to the general powers of Congress.

When that clause of Section 8 of Article I of the Constitution, which authorizes Congress to borrow money, [*280] etc., was *under consideration, it first read, "to borrow money and emit bills on the credit," etc.

Upon a motion to strike out "emit bills," the following debate occurred:

"Mr. Gouverneur Morris moved to strike out 'and emit bills' on the credit of the United States.

"If the United States had credit, such bills would be unnecessary; if they had not, unjust and useless."

"Mr. Butler seconds the motion.

"Mr. Madison. Will it not be sufficient to prohibit the making them a tender? This will remove the temptation to emit them with unjust views; and promissory notes in that shape may in some emergencies be best.

"Mr. Gouverneur Morris. Striking out the words will leave room still for notes of a responsible minister, which will do all the good without the mischief. The moneyed interest will oppose the plan of government, if paper emissions be not prohibited.

"Mr. Gorham was for striking out without inserting any prohibition. If the words stand, they may suggest and lead to the measure.

"Mr. Mason had doubts on the subject. Congress, he thought, would not have the power unless it were expressed. Though he had a mortal hatred to paper money, yet as he could not foresee all emergencies, he was unwilling to tie the hands of the legislature. He observed that the late war could not have been carried on had such a prohibition existed.

"Mr. Gorham. The power, as far as it will be necessary or safe, is involved in that of borrowing.

"Mr. Mercer was a friend to paper money, though in the present state and temper of America he should neither propose nor approve of such a measure. He was consequently opposed to a prohibition of it altogether. It will stamp

April, 1865.]

MAYNARD v. NEWMAN.

Opinion of the Court—Beatty, J.

inspicion on the government to deny a discretion on this point. It was impolitic also to excite the opposition of all those who were friends to paper money. The people of property would *be sure to be on the side of [*281] the plan, and it was impolitic to purchase their further attachment with the loss of the opposite class of citizens.

“Mr. Ellsworth thought this a favorable moment to shut and bar the door against paper money. The mischief of the various experiments which had been made were now fresh in the public mind, and had excited the disgust of all the respectable part of America. By withholding the power from the new government, more friends of influence would be gained to it than by almost anything else. Paper money can in no case be necessary. Give the government credit, and other resources will offer. The power may do harm, never good.

“Mr. Randolph, notwithstanding his antipathy to paper money, could not agree to strike out the words, as he could not foresee all the occasions that might arise.

“Mr. Wilson. It will have a most salutary influence on the credit of the United States to remove the possibility of paper money. This expedient can never succeed while its mischiefs are remembered, and as long as it can be resorted to it will be a bar to other resources.

“Mr. Butler remarked that paper was a legal tender in no country in Europe. He was urgent for disarming the government of such a power.

“Mr. Mason was still adverse to tying the hands of the legislature altogether. If there was no example in Europe, as just remarked, it might be observed on the other side that there was none in which the government was restrained on this head.

“Mr. Read thought the words, if not struck out, would be as alarming as the mark of the beast in Revelations.

“Mr. Langdon had rather reject the whole plan than retain the three words, ‘and emit bills.’

“On the motion for striking out: New Hampshire Massachusetts, Connecticut, Pennsylvania, Delaware, Virginia, North Carolina, South Carolina, Georgia. Ayes, 9.

Opinion of the Court—Beatty, J.

“New Jersey, Maryland. Noes, 2.

“The clause for borrowing money was agreed
con. Adjourned.”

To this report the editor adds the followin
[*282] * “This vote in the affirmative by Virginia w
sioned by the acquiescence of Mr. Madison
became satisfied that striking out the words would
able the government from the use of public notes, s
they could be safe and proper, and would only cu
pretext for a paper currency, and particularly for
the bills a tender either for public or private debts.

This debate shows that whilst a decided majority
convention were in favor of striking out the word
bills,” they were induced to favor the motion by
motives. Some wished to deprive Congress of all
issue paper money. Others did not wish to depri
gress of the power to issue bills of credit or paper
but only to strike out those words, lest their r
should be construed into an invitation to Congres
roduce a system of paper bills of credit as a cir
medium, which nearly all thought would not be
ble in the then situation of the country. But wl
clause was stricken out there were unmistakable
tions by several members that still the governmen
have the *right* under certain exigencies to issue suc

The ninth section contains the limitations upon th
of Congress. In that section there is no limitation or
tion prohibiting the issuance of bills of credit or of
them a legal tender. As this question was brought to t
tion of the convention in the discussion of the eighth
and as it was distinctly claimed that Congress wou
power to issue bills of credit under its general pow
out any special grant, it appears to us that the re
would have been imposed in the ninth section, if
vention had not been satisfied that it was impro
unwise to do so.

We will probably be answered that the theory o
the Constitution was framed was, that the Congress
possess no power but what was specially granted to

It would be idle to say Congress should *not* have such a clause. Such a clause would be marring the symmetry of the instrument and inserting useless and nugatory words. The ninth section was intended to limit the exercise of powers expressly granted in the eighth section, but not to prohibit the exercise of powers *never* granted. [*283] The argument is plausible, but certainly not sound on its application. The ninth section not only limits powers expressly granted in section eight, but also limits the action of Congress on subjects to which no allusion is made in section eight. One of the prohibitions is in these words: "The privilege of the writ of *habeas corpus* shall not be suspended unless when in case of rebellion or invasion the public safety may require it."

Now, there is certainly nothing in section eight which expressly gives to Congress the right to suspend the writ of *habeas corpus*. If section nine was only intended to explain the express powers granted in section eight, why was this clause introduced? The only possible explanation of the presence of this clause is to suppose the convention understood and knew that the government must, to sustain itself and perpetuate its existence, assume many powers that were not *expressly granted*. That it assumed and exercised them as auxiliary to and result of those great powers which were expressly granted. It supposed, probably, that in times of difficulty the government would be compelled occasionally to suspend the writ of *habeas corpus*, as the British government under similar circumstances had done. Whilst they were not willing to deprive the government of that power, they were disposed to restrict it as far as compatible with the public safety. So, too, with regard to bills of credit; whilst the government was unwilling to *invite* Congress to introduce a bill of currency, by inserting such powers among the express grants, they were equally *unwilling* to deprive them of that power if the exigencies of the nation required its exercise.

When we look to the tenth section, which contains the provisions on State authority, we find the States are pro-

Opinion of the Court—Beatty, J.

hibited from emitting bills of credit, or making anything but gold and silver a legal tender. So the subject was again and again called to the attention of the convention. Their deliberate intention seems to have been to prohibit these powers to the States and *not to prohibit* them to the general government. But whilst the convention, of set purpose (and not, as it appears to us, either from an oversight or the desire to preserve the symmetry and [*284] consistency of the instrument), refused *to prohibit these powers to the government, it also refused to make an express grant thereof. Not only was there no prohibition against the exercise of such authority contained in the ninth section, but no one ever proposed, so far as we can see with the lights before us, to insert such a clause. It seems to have been left with the tacit understanding that such a power might be claimed at some future day, and that it should be left to others to decide whether, under the general powers conferred on Congress, this power to issue notes and make them a circulating medium could be exercised.

Similar powers have been exercised by the general government from its first institution, and they have been sanctioned by all departments of the government, legislative executive and judicial. Two United States banks have been chartered, and treasury notes or bills of credit have been issued several times heretofore. Congress has repeatedly passed acts declaring sometimes one kind of money and sometimes another shall be a legal tender; sometimes silver, at others gold; sometimes foreign, and sometimes domestic coin. The constitutionality of these acts has never been seriously questioned. At least it has been the uniform practice of government for more than three quarters of a century to make, alter and modify the law in regard to what shall be a legal tender, and those laws have uniformly been submitted to and acknowledged as the law of the land. If Congress can make gold or silver a legal tender, it certainly can make copper, lead or iron a legal tender. If it may make copper a legal tender, why not *stamped* paper, or any other article?

Opinion of the Court—Beatty, J.

e Constitution prohibits the States making anything gold or silver a legal tender. But there is no such action on the powers of Congress. There certainly is power conferred on Congress in express terms to make a legal tender. The power to make laws on this subject must be exercised as one of the subordinate powers arising from the general nature of the more extensive and important powers granted. The uniform practice of government in regard to such powers, and the acquiescence of the people for seventy-five or eighty years, is certainly sufficient to establish this as a constitutional power.

There is one clause of the Constitution to which [*285] reference is seldom made in investigating the power of Congress, and one which, in our opinion, has never received that attention or consideration to which it is entitled. Usually printed, that clause reads:

SEC. 8. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

But Mr. Justice Story, in speaking of the phrase "to pay the debts, and provide for the common defense and general welfare of the United States," uses this language: "An attempt has been sometimes made to treat this clause as distinct and independent, and yet as having no real significance *per se*, but (if it may be so said) as a mere prelude to the succeeding enumerated powers. It is not improbable that this mode of explanation has been suggested by the fact that in the revised draft of the Constitution in the Convention, the clause was separated from the preceding clause in the same manner as every succeeding clause was, namely, by a semicolon and a break in the paragraph; and that it now stands in some copies, and, it is said, that it stands in the official copy, with a semicolon interpolated." (Story Const., Sec. 912, vol. 1.)

According to Mr. Story, the sentence should be printed as: "The Congress shall have power to lay and collect taxes, duties, imposts and excises; to pay the debts and

Opinion of the Court—Beatty, J.

provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;" or thus:

"The Congress shall have power to lay and collect taxes, duties, imposts and excises;

"To pay the debts, and provide for the common defense and general welfare of the United States;

"But all duties, imposts and excises shall be uniform throughout the United States."

Either of these sentences are very different from the one we find in the present printed copies of the Constitution.

If the phrase "to pay the debts, and provide for [*286] the common defense," etc., was separated into a distinct paragraph, no one (unless it was a blind and insane partisan politician) could read it without understanding that it was a distinct power granted to Congress to provide for the common defense, etc., and not a mere qualification of the power to levy and collect taxes. If the word "excises" is followed by a semicolon instead of a comma, it appears to us the most natural and obvious understanding of the sentence would be, that it was an independent grant of power, and not a qualification of the power to tax. If we take it as it is now usually printed—the word "excises" being followed only by a comma—then the sentence becomes a most obscure and puzzling one. It is capable of either interpretation. It might, without any violence to the language as printed, mean either that Congress should possess the power generally "to pay the debts and provide for the general welfare," etc., or it might mean Congress shall have the power "to levy and collect taxes, etc., *wherewith* to pay the debts and provide for the common defense," etc. But even as the Constitution is now printed, we think the former interpretation the more rational one. The preamble recites that the Constitution is ordained and established, among other things, "to provide for the common defense and promote the general welfare." If such were the objects of framing the Constitution, what more natural than to grant to Congress the power to carry out those objects? But it is argued if these general powers were granted to Congress, it

ded everything necessary for the maintenance of a al government, and that the other special grants of r in the subsequent portions of section 8 were entirely cessary. To this argument we answer: Congress might r this general grant of power pass any laws that were ary or proper for the common defense or general wel-

But the question would constantly recur upon each sed law, Is this *necessary* or *proper* for the common ise or general welfare? May it not be better to leave o the local legislation of the different States?

on those points where the convention thought it best the laws should be uniform throughout the United s, express power was granted to Congress so as to for- stop the question of the constitutionality of laws being raised. *Upon other points it was [*287] to time and experience to determine whether

power was necessary or proper to be exercised to carry effect the great objects of the Constitution. This seems ave been the view taken of the Constitution by many bers of the convention, including James Madison, that t advocate of State rights and strict construction—a r entertained by him whilst he was framing the Consti- on, as will appear from the extract from Elliot's debates n the discussion in relation to striking out the words nit bills." Any views he may have expressed afterwards n engaged in a heated political controversy would be fled to very little weight.

he Constitution, as interpreted by those in power, has ally conferred on Congress and the Executive all the ers necessary to conduct the affairs of a great nation; to lect that nation from foreign aggression and domestic urrection. As interpreted by one of the great political ies of the country, *when out of power*, it has merely been l as a compact among a multitude of sovereign and inde- dent nations, with this singular feature in the compact, each nation included within the league should have the t to interpret the compact for itself, and to violate it at sure, in any or all particulars; and to be wholly irre- mible to the other members of the league for such viola-

Opinion of the Court—Beatty, J.

tion; not even to be liable to the penalty of war for the violation of its duties.

We cannot suppose that the wise and great men who framed the Constitution ever intended to do anything so absurd as to make a contract without providing the means to enforce it. But the same men who, when out of power and hopeless of obtaining it, have interpreted the Constitution so as to make of it nothing but an absurd nonentity, have, when *in power*, exercised under it all the powers ever claimed for the United States by the most ardent supporters of a strong national government.

Giving, then, what we believe to be a fair and just interpretation to the Constitution, we think that clause which empowers Congress to pass all laws "which shall be necessary and proper for carrying into execution the foregoing powers" should have a most liberal construction.

[*288] *That Congress, under this general power, and indeed from the very nature of the general power granted, has the right to pass all laws that may be necessary, proper, *convenient or useful* in carrying out the special power granted. That such has been the interpretation generally put upon the Constitution by all branches of the government (legislative, judicial, and executive), from the first hour of its institution down to the present time, is undoubtedly true.

Usage and general consent are allowed great weight in interpreting all laws. Courts are always reluctant to overturn a long-established rule, and will not do so unless the necessity is apparent. The reasons for applying the *stare decisis* to questions of constitutional power are much stronger than in other cases. The legislative department of our government having exercised certain powers for a long series of years, commencing with the very first establishment of the government, and those powers during all the time having been sanctioned by the co-ordinate branches of the government, it would be little short of revolutionary for courts, at this late day, to decide such powers were usurped. This court is not disposed to inaugurate any such system of revolutionary decisions.

 Opinion of the Court—Beatty, J.

, then, that Congress had the power to pass the discussion, not because such power is specially and not because it pertains especially to any one of granted, but because it is a law “necessary and be passed in carrying out the general system of it with which Congress is intrusted.

een a matter of reproach to those who claim that al government may exercise such powers as are discussion, that they do not agree among them- o the source of power in that government. It is is such disagreement, and that is one indication vocates of this power may be wrong.

the advocates of State rights any more consistent uments? One counsel, whose brief is before us, admit (and really we cannot see how such an ad- n be avoided) that the United States might *coin* : or lead, and call that money. That if the gen- nment can make anything a legal tender *doubtful), it might make tin, lead or [*289] gal tender, but thinks the odium attached course would prevent the government from doing his counsel thinks it clear that Congress has no mit bills of credit.

counsel, equally learned and earnest in his argu- its Congress may issue *bills of credit*, but scouts at Congress may make anything but gold or silver is metals, as he terms them) a legal tender. He to question that Congress may make the *precious* o suppose he means gold and silver, although er metals are more valuable than silver) a legal let there is no express power given to Congress hese metals, or either of them, a legal tender. o prohibition against Congress making anything l tender.

ongress has or has not the power to declare what a legal tender. If Congress has the power, it ves it from the clause which confers the power ney and regulate its value, or else it is one of the owers naturally arising from the grant of other

Opinion of the Court—Beatty, J.

powers. If derived from the power to coin, etc., then it may well be contended Congress could only make coined money a legal tender; but even then they might make copper, which is certainly a coined money, the *only legal tender*, to the exclusion of both gold and silver. If, on the other hand, it is a resulting power derived from the general powers of the government, Congress might make wheat, tobacco, or any other commodity, a legal tender.

Finally, the learned counsel, as a climax to his argument against the power of Congress to make anything but what he terms precious metals a legal tender, uses this language:

“Again, if Congress can, by impressing the Federal stamp on paper, give it a valid character as a circulating medium, why may it not, by the same means, give to a piece of lead, iron, tin, or to any other base metal of equal weight to some gold coin, the legal character of money, and compel men to receive it at its nominal value, however much that might be in excess of its real worth? Or, to apply a certain test, a sort of ‘*experimentum crucis*,’ why may not Congress, following the example of certain tyrants of the middle ages, debase the current coin, so that a coin having only [*290] one-half of the proper *quantity of gold and silver would be made to pass for double its value?”

We think we have already shown that Congress may make money of any kind of metal, even of those base metals of which the gentleman speaks so contemptuously.

But can Congress *debase the currency*? We had supposed on this subject there could be no possible room for doubt. Congress has power to coin money and regulate the value thereof.

If it can regulate the value of money, it may increase or diminish the weight of the metal to be used in fabricating any coin of a given value or denomination.

The Congress of the United States, in 1834, did debase the gold coin of the country, to the extent of about six per cent., or a little more. By the law of 1792 the eagle contained two hundred and forty-seven and one-half grains of pure gold, or two hundred and seventy of standard gold, the alloy being one-twelfth or eight and one-third per cent.

the whole. In 1834 the weight of the eagle was reduced from two hundred and seventy grains to two hundred and twenty-eight grains. At the same time the alloy was increased from eight and one-third per cent. to ten per cent. of the whole, so that after 1834 the eagle contained only two hundred and thirty-two and one-fifth grains of pure gold, or six per cent. and a fraction less than the old eagles. Yet until we saw the brief in this case we certainly were not aware that any one ever questioned the *power* of Congress to make such debasement. The policy of the act of 1834 was fiercely assailed at the time; but if the constitutionality of the act was questioned, and it came within our observation at the time the act was passed, we have utterly forgotten it. If, then, the arguments in favor of the constitutionality of the act are often contradictory and unsatisfactory, those proposed to it are equally so.

We are gravely invoked to hold this law unconstitutional because of its being unjust, oppressive and impolitic. We are told that the issuance of paper promises to pay which are not redeemed according to the promise on the face of the paper is but a fraud and a swindle; that it is a most *outrageous fraud to compel creditors to take [*291] such paper in payment of their debts; that such a dishonest and unfair law cannot inure to the benefit of the government; that the issuance of such money does not add to the resources of the government, or aid it in any manner in conducting its military or financial operations; that it should never be presumed that powers were granted to the government which could in no case result in benefit or advantage to the nation at large, but could only be used as a means to enable one portion of the community to commit the most glaring frauds on another class.

Doubtless courts always endeavor to so interpret all laws—whether those contained in the Constitution of the general government and several States, or those enacted by the national and state legislatures—as to avoid glaring injustice; and no principle could be more just. For in the interpretation of laws and of contracts one principle should always guide the courts in preference to all others, that is,

Opinion of the Court—Beatty, J.

to carry out the intention of the contracting parties or of the law-makers, whether constitutional conventions or legislative bodies.

It should never be inferred that any law-making power intended to perpetrate an act of injustice unless the language of the law is such that it is impossible to so interpret it as to avoid injustice. If, then, we were thoroughly convinced that the power claimed for Congress could, when exercised, only result in unmitigated evils, injustice and oppression, without any possible countervailing advantages, and that these propositions are too clear for doubt or argument, as counsel seem to assume, then, indeed, would we hesitate to sustain the power.

We might content ourselves here by saying that we differ totally from counsel in regard to the wisdom, justice, and policy of the law under discussion. That there being a variety of opinions as to the justice and propriety of the law, all argument on this point should end here; but since so much has been assumed in this argument in regard to the absurdity and injustice of the law under discussion, it may not be improper for us to make some suggestions as to the wisdom, beneficence and absolute necessity of the act.

[*292] *We think it would require a man to be very ignorant, or possessed of a great deal of hardihood, to say the colonies could have successfully conducted the revolutionary war without the use of continental paper money. Even in our present struggle, with all the immense wealth and resources of the country, we think it would be difficult for any one to show how the government could have procured the means to conduct the present civil war to a successful termination without a resort to some system of government paper money.

That it was wise policy, and in accordance with the dictates of justice and humanity, to make it a legal tender, we have never doubted. The making it a legal tender gave this currency an additional value, and to some extent checked its depreciation. Besides this, the banks had suspended and locked up their gold in their vaults; the great bulk of

Opinion of the Court—Beatty, J.

the coin of the country was thereby withdrawn from circulation. A panic was created, and a great portion of that not in the banks was hid away and hoarded by individuals. The government, in order to conduct the war in which it was engaged, was bound to have large sums of money. A portion of that money must be in gold. If the government borrowed from the banks they must expand their circulation.

Such a course by suspended banks would have destroyed confidence in their solvency, and the bills would soon have become worthless. The demand for gold would have been increased; its value would have become greatly enhanced as compared with all other species of property. The whole debtor class of the community would have become insolvent, the business of the country would have been paralyzed, general distress and misery would have been brought on the country, and the people in despair would have given up the contest in which they were engaged. By adopting the government currency a circulating medium was furnished, which, although greatly depreciated, was much better than bank notes would have been had the banks so extended their circulation as to loan to the government all the money it needed. By making the treasury notes a legal tender, the demand for gold was diminished, and the debtor classes were saved from utter ruin. That such a policy was a wise one is evidenced by *the universal prosperity [*293] of the Eastern States. Under such a system commerce, manufactures and agricultural pursuits have all been stimulated.

Although more than a million of men, and they the most active, healthy, and able-bodied of the people, have been withdrawn from the ordinary pursuits of life to prosecute the civil war in which the government is involved—although two hundred millions of debt due from the Southern States to the Northern States was confiscated less than four years since; notwithstanding the immense burdens of taxation imposed on the loyal people of the North by this war, still the people, encouraged and stimulated by a reliable and abundant circulating medium and the liberal policy of the

Points decided.

government, have, by their unwonted energy and industry, swelled the agricultural products of the country to an amount far exceeding anything we produced before the war.

Manufactures of every kind, except cotton fabrics, have been greatly extended. Commerce never was more flourishing. The general wealth of the country has been immensely increased.

Search the history of the world from the earliest dawn of civilization to the present day, and it will be impossible to point to a time or place where twenty millions of people were so universally prosperous as the people of the Eastern States have been within the last two years. Every species of labor and industry has been rewarded. Employment has been found for all who were able and willing to engage in any useful occupation. Never, in any other age or country, have the people generally been able so readily to procure all the necessities and many of the luxuries of life.

However absurd theorists may prove the government system of finance to be, however objectionable it may be to that class of political economists who predicted that grass would grow in the streets of all northern cities, and the whole northern people would sink into poverty, distress and want, if they attempted to suppress the rebellion, we cannot think a system utterly foolish, immoral and unjust which has produced such results as we have witnessed in the last two years.

The order of the court below is affirmed.

EX PARTE CRANDALL.

[1 NEVADA, 294.]

¹ CAPITATION TAX NOT UNCONSTITUTIONAL.—The revenue law of the State imposing a capitation tax of one dollar on all passengers carried out of the State by stage companies, is not a regulation of commerce among the States, nor a tax on exports, and is not in conflict with the powers of the federal government.

ITEM.—There is no restriction upon the taxing power of a State, except the laying of imposts or duties on imports or exports, and if in the exercise of this power foreign commerce, or commerce among the States, be incidentally affected, the State authority must nevertheless be maintained.

(1) This law was declared unconstitutional and void by the Supreme Court of the United States. *Crandall v. State of Nevada*, 6 Wall. 35.

Opinion of the Court—Lewis, C. J.

FEDERAL AND STATE POWER TO REGULATE COMMERCE.—The power to regulate commerce is not exclusive in Congress, but concurrent in the Federal government and the States. No State law upon the subject will therefore be unconstitutional, unless in direct collision with some law or regulation of Congress. The power is exclusive in Congress only so far as it is exercised by it. The mere grant of power to the general government does not necessarily imply a prohibition upon the States.

MEANING OF WORDS "IMPORTS" AND "EXPORTS."—The words "imports" and "exports," as used in the Federal Constitution, include property only, and do not extend to individuals.

TAX ON PASSENGERS NOT A POLL TAX.—The tax of one dollar levied on passengers leaving the State is not a poll tax, and does not conflict with the constitutional provision limiting the poll tax to four dollars.

THIS was an application for writ of *habeas corpus*, made originally to the Supreme Court.

The facts appear in the opinion.

Williams & Bixler and Chas. E. Flandreau, for Petitioner.

Geo. A. Nourse, Attorney-General, for Respondent.

*By the Court, LEWIS, C. J.:

[*299]

It is provided by the ninetieth section of the revenue act of 1865, that "there shall be levied and collected a capitation tax of one dollar upon every person leaving this state by any railroad, stage-coach or other vehicle engaged or employed in the business of transporting passengers for hire; and every person, firm, corporation or company owning or possessing or having the care or management of any railroad, stage-coach or other vehicle engaged or employed in the business of *transporting passengers for hire, [*300] shall pay in the manner as herein provided to the sheriff, as *ex officio* license collector of the several counties within this state, the said tax of one dollar for each and every person so conveyed or transported from this state."

Sec. 91 declares that "for the purpose of collecting said tax every such person, firm, corporation or company, their agent or agents, shall make a statement under oath to the sheriff or other officer authorized to collect said tax, of the number of passengers so conveyed or transported from the

Opinion of the Court—Lewis, C. J.

state by any railroad, stage-coach or other vehicle owned by him or them, or under his or their control or charge, on the first Monday of each month for the preceding month, and shall pay over to the sheriff or other officer the capitation tax as provided in this act for each passenger so conveyed or transported, which tax shall be paid in the county from which such passenger shall be conveyed or transported."

For the purpose of enforcing the observance of these provisions of the law, it is made the duty of all justices of the peace, to whom complaint may be made, to issue a citation ordering any party or parties refusing to make the statement required by section 91, to appear forthwith before the justice issuing such citation, and answer upon oath concerning the number of passengers conveyed or transported out of the state from that point or place for the preceding month; and such justices are also authorized, in case of refusal so to answer, to commit such person or persons for contempt.

The petitioner being the agent of the Pioneer Stage Company at Carson city, was required by the sheriff of Ormsby county to make statement of the number of passengers conveyed out of the state by that company in the month of April, A. D. 1865. Having refused, the proper proceedings were had, a citation issued, and upon his refusal to answer before the justice, he was regularly committed for contempt, and he now appears before this court upon *habeas corpus*, demanding his discharge upon the ground that that portion of the revenue law levying this tax is unconstitutional and void.

All other questions being expressly waived by counsel, the constitutionality of the law alone will receive our consideration.

[*301] *Questions as to the relative powers of the general government and the several states have, from the foundation of the Union, been as prolific in forensic discussions and judicial investigation as in political divisions.

And no feature in the history of those controversies is more prominent than the open reluctance which the state courts have ever manifested in deciding against the author-

Opinion of the Court—Lewis, C. J.

ty of the states. Whilst in many cases, perhaps, political sentiments may have given color to their decisions, yet it must be acknowledged that there are weighty reasons in support of the general policy which they have pursued upon such questions.

A proper respect for the opinions of those composing the co-ordinate branches of the government is often in itself sufficient to outweigh a doubtful opinion entertained by the court. The fact also that no appeal can be taken from the decision of the highest court of a state in questions of this character, where its decision is against the authority of the state, and in favor of the general government, is certainly no insignificant consideration, neither should the necessities of the state, the nature of the authority exercised, nor the object sought to be attained, be overlooked. If the authority exercised or the laws enacted be dictated by a wise policy or an imperious necessity, and the welfare or safety of her people is promoted thereby, the court which would be reluctant in depriving her of the one, or annulling the other, should need no apology.

Nor have the considerations favoring a liberal construction of federal powers much weight in cases of this kind, or it is obvious to all that the powers of the general government are not necessarily augmented by derogating the authority of the state. They may be deprived of powers by their own courts upon the plea of repugnancy to some authority of the general government, which authority that government may never recognize in itself, or, if recognized, never exercise, thus paralyzing the powers of the States and depriving them of sovereign and indispensable authority without conferring the shadow of power upon the general government, and producing the unhappy result of a state without the power and a Congress without the disposition to legislate upon subjects of vital importance to the people. Whilst we believe the *supremacy of [*302] constitutional laws and regulations of the general government should be cheerfully recognized, and the decisions of its supreme court determining its authority accepted as final and controlling, care should be exercised

Opinion of the Court—Lewis, C. J.

that those powers essential to the welfare and prosperity of the state should not be unnecessarily relinquished.

No power, perhaps, is more essential to secure the great end of government than a full and unrestricted power of taxation; and as a total deprivation of that power would result in inevitable and hopeless ruin, so every restriction upon, or derogation from it, proportionately diminishes the power of the state to maintain itself. And as the power and prosperity of the states directly enhance the glory and augments the power of the general government, so weakness and poverty must necessarily produce the opposite results. All considerations, then, outside of the immediate questions in this case, are certainly in favor of sustaining the law of this state.

The first point made in the argument of this case is that the law imposing the capitation tax of one dollar upon passengers leaving the state, is in conflict with the power of Congress to "regulate commerce with foreign nations, and among the several states and with the Indian tribes," and also that it is repugnant to that provision which declares that "no state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

It is not claimed that the revenue act conflicts with any law of Congress passed under its authority to regulate commerce, but it is insisted that that power is exclusive in Congress, and any exercise of it by a state is repugnant to its authority over the same subject.

Waiving, for the present, the question of whether the Constitution vests all power of legislation upon the subject exclusively in Congress, we will direct our inquiries to the question of whether this act of the legislature can be considered a regulation of commerce. We think not. Though it may, perhaps, incidentally or indirectly affect commerce between the states, it is evident the legislature had no intention of legislating for the regulation of commerce, [303] nor of interfering with *the power of Congress to do so; but in the exercise of a power unquestionably

Opinion of the Court—Lewis, C. J.

sted in it, a burden is, perhaps, placed upon the commerce among the states. Can it, however, be said that every act of a state legislature, which remotely or incidentally affects commerce between the states, is unconstitutional? If so, every act which a state may adopt imposing taxes upon its citizens or the property within its jurisdiction must be unconstitutional; for no tax can be imposed on property which will not in some way affect commerce, not only between the states, but also with foreign countries.

All taxes upon imported goods must in some degree affect their importation, and yet that a state may tax such goods after they have left the possession of the importer) to an extent which would even result in a total prohibition of their importation, there is no doubt. So a state may require a license to sell goods imported from another state, and may prohibit all sales except by those having a license (*License Cases*, 5 How. 573), and yet the direct effect of such a regulation would be to decrease the importation of such articles; but as said by Mr. Justice McLean, in the cases above cited, "still it is clear that a law of a state is not rendered unconstitutional by an incidental reduction of importation." And indeed it seems to be well settled upon the weightiest authority, that there is no restriction upon the taxing power of the state, except the laying of imposts or duties on imports or exports; and if, in the exercise of this power, foreign commerce or commerce among the states be incidentally affected, it cannot be said to be a regulation of it, and the state authority must be maintained. This is the doctrine maintained by many of the framers of the Federal Constitution, and by many of its most able expounders. Mr. Hamilton, in the thirty-second number of the "Federalist," says: "I am willing here to allow in its full extent the justness of the reasoning which requires that the individual states shall possess an independent and uncontrollable authority to raise their own revenue for the supply of their own wants. And making this concession, I affirm (with the exception of duties on imports and exports) they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense." And in the

Opinion of the Court—Lewis, C. J.

[*304] case of *McCulloch v. State of Maryland* (4 Wheat. 428), Chief Justice Marshall says: "It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself."

The very prohibition that no state shall lay any impost or duty on imports or exports, is itself a strong implication that as to all other taxes the authority of the state remains unrestricted. Chief Justice Taney, in his dissenting opinion in the *Passenger Cases*, says: "I may, therefore, safely assume that, according to the true construction of the Constitution, the power granted Congress to regulate commerce, did not in any degree abridge the power of taxation in the states. * * * They are expressly prohibited from laying any duty on imports or exports, except what may be absolutely necessary for executing their inspection laws, and also from laying any tonnage duty. So far their taxing power over commerce is restrained, but no farther." And in the case of *Livingston v. Van Ingen*, Chancellor Kent makes use of the strong language that "the states retain the same absolute powers of taxation which they possessed before the adoption of the Constitution, except the power of laying an impost, which is expressly taken away. This very exception proves that without it the states would have retained the power of laying an impost; and it further implies *that in cases not excepted* the authority of the states remains unimpaired." If, then, the passengers conveyed out of the state be not comprehended within the term "export" (as they certainly are not), the levying of the tax upon them while within the jurisdiction of the state is a legitimate exercise of a power which the state unquestionably possesses.

But it is said, if the state has the power to levy this tax; it may be so exercised as to prohibit all emigration from the state. True, but that would be an abuse of power, and it is illogical to argue from its abuse against its existence.

April, 1865.]

EX PARTE CRANDALL

29

Opinion of the Court—Lew.

o a state might impose taxes so burdensome on imported goods as to prohibit their importation. Nevertheless, settled beyond a doubt that it must be so. If, however, it is admitted that the act of the legislature is a regulation of commerce, it is a complete answer to the position of counsel for the petitioner that the state law does not conflict with any act or regulation of Congress, and the power to regulate commerce being concurrent in the states and the general government, the state may pass any law regulating it within its jurisdiction not conflicting with some law of Congress. The concurrent power of the state, however, being subordinate to that of the general government, its laws must yield whenever they conflict with any act of Congress regulating the subject. We are aware that a great diversity of opinion has existed and still exists upon this perplexing question, and that some of the ablest judges who have graced the jurisprudence of our country have entertained opposite opinions upon it; and though it has often engaged the attention of the courts, it cannot be said to be free from doubt and uncertainty. The weight of authority and force of reasoning, however, certainly seems to be in favor of the doctrine that the power is exclusive in Congress only so far as it is exercised by it; that a state law is not unconstitutional because repugnant to the dormant power in Congress to regulate commerce.

The mere grant of power to Congress cannot by any reasonable construction imply a prohibition upon the states. If so, why are many of the powers expressly granted to Congress prohibited to the states in the same instrument? Indeed, nothing seems more evident than that the framers of the Constitution did not so intend it. If they did they may be charged with having introduced numerous useless and objectless provisions into it, which is an assumption not to be tolerated. It is apparent, from the whole tenor of the Constitution, that the object was to vest some powers exclusively in the general government, and to leave others to be concurrently exercised by it and the several states. The power is granted to the federal government "to grant letters of marque and reprisal," "to coin money," and "to

Opinion of the Court—Lewis, C. J.

make treaties," and yet by Section 10, Article I, of the Constitution, these same powers are expressly prohibited to the states.

If the grant of such powers implied a prohibition [*306] upon the *states, why this express prohibition of some of them? True, there are powers granted which from their very nature become exclusive. Any power growing out of the federal union and not possessed by the states before the adoption of the Constitution are necessarily exclusive. As, for instance, Congress has power to borrow money on the credit of the United States, to constitute tribunals inferior to the supreme court, and to make rules for the government of the land and naval forces.

These are powers resulting directly from the union of the states, and cannot be exercised by any one of them. But where the authority is one vested in the states before the adoption of the Constitution, and it is not directly repugnant to, or incompatible with, a similar power granted to Congress, it is not exclusive, and may be exercised concurrently by both governments, unless the granted power be in express terms made exclusive, or its exercise is prohibited to the states; and with the qualification always, that when the laws of a state and of Congress conflict, or the state law is repugnant to any law of the general government, that of Congress, being the supreme law of the land, must prevail.

There are many powers granted to Congress, the exercise of which is indispensable to the safety and welfare of the states, and which have never been exercised by Congress. The power to establish uniform laws on the subject of bankruptcy throughout the United States; to fix the standard of weights and measures; to provide for organizing, arming and disciplining the militia, are granted to Congress, and yet the right of the states to exercise the same powers has been always recognized, and never seriously questioned. In the case of *Houston v. Moore* (5 Wheat. 1), the supreme court of the United States held that the grant of power to the Federal Government to provide for organizing, arming and disciplining the militia did not preclude the states from

Opinion of the Court—Lewis, C. J.

lating on the same subject, provided the law of the is not repugnant to the law of Congress. So, too, in case of *Sturges v. Crowninshield* (4 Wheat. 196), it was by the same court that a state might legislate upon the act of bankruptcy, notwithstanding the power is granted Congress to pass uniform laws on the subject. It d be rather difficult, we apprehend, to give anystantial reason why these powers should be con- [*307] ant, and the power to regulate commerce exclu-

There is nothing in the form of the grant, and only there seems to be nothing in the character of the ers, which would authorize a rule in the one case not icable in the other. If not, these cases directly sustain views upon this question. In the early history of the stitution this was the prevailing doctrine among the st advocates for its adoption. In the thirty-second ber of the "Federalist" it is said that "notwithstanding affirmative grants of general authorities, there has been most pointed care in those cases where it was deemed im-er that the like authorities should exist in the states, to rt negative clauses prohibiting the exercise of them by states." In the same number, Mr. Hamilton says that e are only three cases in which the State authority is nated: 1st, where the grant to the general government a express terms exclusive; 2d, where the like power is ressly prohibited to the state; and 3d, where an authority he states would be absolutely and totally contradictory repugnant to one granted to the Union. In the case of *Ington v. Van Ingen* (9 Johns. 507), Chancellor Kent, delivering the opinion of the court, says: "The powers he two governments are each supreme within their re- tive constitutional spheres. They may each operate a full effect upon different subjects, or they may, as in case of taxation, operate upon different parts of the same ject. * * * We have nothing to do in the ordinary use of legislation with the possible contingency of a col- on, nor are we to embarrass ourselves in the anticipation heoretical difficulties, than which nothing could in gen- l be more fallacious. * * * One safe rule of con-

Opinion of the Court—Lewis, C. J.

struction and of action is this: That if any given power was originally vested in the states, if it has not been *exclusively* ceded to Congress, or if the exercise of it has not been prohibited to the states, we may then go on in the exercise of the power until it comes practically in collision with the *actual exercise* of some congressional power."

Mr. Justice Thompson, in the same case, says: "But it is obvious that the mere grant of a power to Congress does not *necessarily vest it exclusively in the body." So this construction has been repeatedly recognized by many of the judges of the supreme court of the United States; and the court itself, in the case of *Wilson v. The Blackbird Creek M. Co.* (2 Pet. 245), expressly declared this to be the correct doctrine even in the case of the commercial power. We would feel satisfied to rest discretion upon the authority of that case were it not for the fact that some of the judges of the same court have subsequently attempted to repudiate the rule there adopted. That case arose upon a privilege granted by the legislature of Delaware to the plaintiff to construct a dam across a navigable creek through which the tide ebbed and flowed. The question was directly raised as to whether the act of Delaware was in conflict with the power of the United States to regulate commerce, and the court expressly passed upon it. In delivering the opinion, Chief Justice Marshall said: "[*308] Congress had passed any act which bore upon the case, an act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows and which abound throughout the lower country of the Middle and Southern States, we should feel not much difficulty in saying that a state law coming in conflict with such an act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely in its repugnancy to the power to regulate commerce with foreign nations and among the several states—a power which has not been so exercised as to affect the question. The act is not in violation of this power in its dormant state." The question again came up before

Opinion of the Court—Lewis, C. J.

that court in the *License Cases* (5 How. 514), and the doctrine is reiterated and sustained by a power of reasoning which ought to have settled the question in that court at least; but in subsequent cases which have been before it, a different rule is laid down by some of the judges, and it is claimed that it has been established by the court.

In *Thurlow v. The Com. of Mass.*, Mr. Justice McLean says: "The acknowledged police power of a State extends then to the destruction of property. A nuisance may be abated. Everything prejudicial to the [*309] health and morals of a city may be removed. Merchandise from a port where a contagious disease prevails, being liable to communicate the disease, may be excluded, and in extreme cases it may be thrown into the sea. *This comes in direct conflict with the regulation of commerce, and no one doubts the local power.* It is a power essential to self-preservation, and exists necessarily in every organized community." Mr. Justice Catron, in the same case, says: "That the law of New Hampshire was a regulation of commerce among the states, in regard to the article for the selling of which the defendants were indicted and convicted, but that the state law was constitutionally passed because of the power of a state thus to regulate, *there being no regulation of Congress, special or general, in existence to which the state law was repugnant.*"

This was declared to be the rule by the entire court, and sustained by the opinion of six of the judges. The question was necessarily involved in those cases and determined by the court. This is certainly an array of authorities which no court should disregard except upon the most pressing necessity, and upon counter authority equally binding.

It is claimed, however, that the supreme court in the cases of *Gibbons v. Ogden* (9 Wheat. 1); *Brown v. The State of Maryland* (12 Wheat. 392), and the *Passenger Cases* (7 Howard, 392), settle the question in favor of the exclusiveness of the power. We think not. The case of *Gibbons v. Ogden* did not involve the question. That case arose upon an act of the legislature of the state of New York granting

Opinion of the Court—Lewis, C. J.

to certain persons the exclusive privilege of navigating all the waters within the jurisdiction of the state with steam-boats. The complainant, claiming the exclusive right under this act, sought to obtain an injunction to restrain the respondent from navigating the waters within the jurisdiction of the state. The supreme court held the act of New York unconstitutional, simply upon the ground that it was in conflict with the act of Congress providing for enrolling and licensing vessels in the coasting trade. The respondent's vessel having been licensed under the act, was entitled, say the court, to navigate any of the navigable waters [*310] of the United States, and no state had a *right to forbid it, as was done in that case. And the court expressly waive the question of exclusiveness. On page 200, the Chief Justice says: "In discussing the question whether this power is still in the states in the case under consideration, we may dismiss from it the inquiry whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We dismiss that inquiry because it has been exercised, and the regulations which Congress deemed it proper to make are now in full operation." The great judge who delivered the opinion in that case has, we think, repudiated the notion that any such point was determined by the court. The case of *Wilson v. The Blackbird Creek M. Co.*, came before the same tribunal subsequently to the decision of *Gibbons v. Ogden*, and that case was relied on by the counsel for the plaintiff in error as conclusive to establish the unconstitutionality of the law of Delaware, but the court holds distinctly and emphatically that the mere grant of power to Congress is exclusive only so far as it may be exercised by it; thus utterly ignoring the construction which has been so often placed upon the case of *Gibbons v. Ogden*. The only question decided in the case of *Brown v. The State of Maryland* was, that a state law prohibiting an importer of foreign goods from selling without a license was unconstitutional, because repugnant to that article of the Constitution which declares that "No state shall lay any impost or duties on imports or exports," the court holding that the importation

ve a right to the importer to sell such goods free from any charge by the state. It is also said by the court that Congress having authorized the importation, by implication authorized the sale by the importer, and therefore any law by the state prohibiting such sale, or taxing the privilege, was an interference with the regulation of commerce by the general government.

Nothing further was determined in that case, and it certainly bears no analogy to the one under consideration.

The opinions and reasonings of some of the judges in the *Passenger Cases* are unmistakably in conflict with our position, and to many of the former decisions of the same court.

But those opinions, so far as they pass upon the question of the *exclusiveness of the power of Congress to regulate commerce, did not receive the concurrence of a majority of the justices. Chief Justice Taney and Justices Daniels, Nelson and Woodbury dissent from the opinions delivered by the other judges, and Mr. Justice Catron distinctly says that the question did not arise in those cases, and placed his concurrence upon the ground that the acts of New York and Massachusetts were repugnant to certain laws of Congress. If he had not changed the opinion which he entertained in the *License Cases* (and there seems to be no indication that he had), a majority of justices were opposed to the reasoning of Judge McLean. Nothing was, therefore, determined in that case, but that the laws of New York and Massachusetts were in conflict with certain laws of Congress regulating commerce and treaties of the general government, and that they were for those reasons void. If it were admitted, however, that the *Passenger Cases* determined the question in favor of the exclusiveness of the power, and the reasoning of Judge McLean is to prevail, those cases are utterly irreconcilable with the theory upon which a large number of cases have been decided by that court, and which are still accepted as authority. And it must be admitted that the reasoning of Judge McLean does not sustain the position, and is in direct conflict with his opinions in other cases. In the case of *Thurlow v. The*

Opinion of the Court—Lewis, C. J.

Com. of Mass., he says: "A license may be required to sell foreign articles when those of a domestic manufacture are sold without one. And if the foreign articles be injurious to the health or morals of the community, a state may, in the exercise of that great conservative police power which lies at the foundation of its prosperity, prohibit the sale of it." But how, if the power to regulate commerce be exclusive in Congress, can a state prohibit the importation of any article of commerce? There is surely nothing in the Constitution which authorizes the prohibition or control of one article more than another. Is there anything in the grant of power which authorizes the prohibition of an article which is injurious to the health or morals of the community any more than that which may be prejudicial to its manufacturing or agricultural interests? Certainly not [312] *The word "commerce," as used in the Constitution, includes commerce in all its ramifications, and in every feature or form which it may assume—that is, with foreign countries and among the states; and if the power to regulate it be exclusive, it is coextensive with the meaning of the word. If Congress alone can exercise that power, the conclusion is easily shown by the simple syllogism: A state law regulating commerce is unconstitutional and void. A law prohibiting the importation of licentious publications, infected goods, or providing quarantine regulations, is a regulation of commerce. Therefore, any law affecting those subjects is unconstitutional. And yet it is admitted by all that a state may prohibit the importation of such articles, and may make quarantine regulations.

And it seems impossible to maintain it upon any hypothesis, except that the power to regulate commerce is concurrent in Congress and the several states. It would be the propagation of a dangerous heresy to hold that a state may regulate commerce whenever, in the discretion of its legislature, the health or morals of the community require it, and that such regulation would be superior to the power of the general government. This would be making the power of Congress to regulate commerce subordinate to the police power of the state; for it gives to the state the power of deter-

ining what articles may be imported and what prohibited, and it needs no argument to show that the power which may prescribe what articles may be the subject of commerce is the controlling one. If the state has a right to determine what articles of commerce are or are not injurious to the health or morals of the community, and to prohibit the importation of whatever may be deemed so injurious, it must be admitted that its power over Congress is unlimited and supreme; and if the power is exclusive in Congress, it amounts to a prohibition upon the States, and no necessity, such as the preservation of health, morals, or safety of the community, could sustain the state law which in anywise regulated commerce, and the exceptions which are made are unwarrantable.

The better rule, and that sustained by the preponderance of authority, seems to be, that subject and subordinate to the *power of Congress, a state may regulate commerce within its own jurisdiction, and its laws enacted for that purpose are unconstitutional only when they conflict with, or are repugnant to, some act or regulation of the general government. This rule removes all possible difficulties, recognizes the supremacy of the power of Congress, and its exclusiveness so far as it may be exercised, and enables the states to relieve themselves from the evils and inconveniences which might possibly arise from the failure or neglect of Congress to exercise any power granted to it. In other words, the states are enabled to protect themselves, not from the laws or constitutional authority of Congress, but from its inaction.

Upon the second point made by counsel for petitioner, little need be said. We do not think that the passengers upon whom this tax is levied can be included within the provision of the Constitution, which declares that no state shall lay any duties or imposts on imports or exports.

It seems to be generally admitted that the words import and export have reference only to property and not to persons. (*Brown v. State of Maryland.*)

Neither does the tax conflict with section 7 of article II of the state Constitution, which limits the poll tax to four

 Points decided.

dollars upon all male residents of the state within ages. This cannot be considered a poll tax with meaning of that section of the Constitution. If it is levied upon the passenger at all, it is levied upon those entering or exercising a certain privilege. But it is more properly a tax upon the common carrier regulated by the number of passengers transported. The state law is therefore constitutional.

The time having expired during which the petition could be held under the commitment of the court below, it can be made remanding him to the custody of the sheriff, but our views here expressed may be a guide in similar cases of this character.

WILLIAM BURLING, RESPONDENT, v. J. T. GOODMAN
ET AL., APPELLANTS.

[1 NEVADA, 314.]

JUDGMENT BY DEFAULT CONFINED TO PRAYER OF COMPLAINT.—When judgment by default is taken, the plaintiff is confined to a recovery of the particular amount or thing demanded in the prayer of the complaint.
IDEM—SPECIFIC KIND OF MONEY.—Where the demand is for judgment in federal currency generally, that is, in dollars and cents, a plaintiff may recover a judgment upon a default payable in a specific kind of money—gold coin, for instance—especially if the latter kind of money is of more value than the former in actual value. Before the passage of the specific act, the district court had no power to render judgment for a judgment in a kind of money, or order that it be satisfied only by gold or silver.
MORTGAGE SECURITY INCIDENT TO THE DEBT.—The quality or character of the contract is in no wise altered because the debt thereby contracted has been secured by mortgage. The security is merely an incident to the debt contracted and sought to be recovered.
OBITER DICTA.—The opinions of a judge upon a point not directly in issue are merely *obiter dicta*, and have not the force, and are not to be regarded as the effect of an adjudication.
CONSTITUTIONALITY OF A LAW—WHEN WILL NOT BE EXAMINED.—It is an established rule that courts will not adjudge whether a law is constitutional or not, unless they are imperatively called upon to do so by the admonitions of duty and the exigencies of the case.

APPEAL from the District Court of the First District of the State of Nevada, Storey County, HOWARD RISING presiding.

Opinion of the Court—Brosnan, J.

The facts are stated in the opinion.

Quint & Hardy, for Appellants.

John Nugent and John R. McConnell, for Respondent.

*By the Court, BROSNAN, J.:

[*316]

This action is brought on two promissory notes executed by Goodman & Driscoll, the appellants. The notes are payable in gold coin, and are secured by a mortgage on real estate. They bear date August 4, 1863. No summons was issued, the defendants having expressly waived process. The complaint was filed and served November 9, 1864. The prayer of the complaint is for judgment in amount, eight thousand dollars and interest, and that the mortgaged premises may be sold to satisfy such judgment, and for such other relief, etc.

The defendants suffered judgment to be taken against them by default, which was entered on the 14th day of November, 1864. The judgment was not rendered until the 15th day of December following. It orders and directs that payment be made in gold coin; and that the premises be sold for gold coin only. No objection appears to have been made to the judgment upon the ground that the default of the defendants had been entered short of the statutory time allowed to file and serve an answer. Nor have any proceedings, as appears, been had in the court below to set aside the default or judgment. The defendants appeal, and the cause comes before this court upon the judgment-roll alone.

The appeal is from so much of the judgment as directs payment in, and sale of the mortgaged premises, for gold coin only.

The counsel for appellants insist that no other relief than that prayed for in the complaint could have been legally granted, and further that the court had no power or authority to render a judgment requiring payment in, or a sale for gold coin alone, at the time this judgment was entered, even though the complaint demanded a judgment and a sale for gold and silver coin.

Opinion of the Court—Brosnan, J.

We think both grounds of objection are well taken, and that the judgment as it stands is erroneous. Where judgment is taken by default, the plaintiff is confined to [*317] a recovery of *the particular amount or thing demanded in the prayer of the complaint. If the prayer be for judgment of one thousand dollars, the plaintiff cannot legally take judgment for a greater amount. Or if he pray for the possession of specific personal property, he cannot have judgment for the return of property of a different kind. The reason and fairness of the rule are obvious.

The defendant by his default admits the justice of the claim, and thus consents that judgment be taken against him for what is prayed for in the first instance. Whereas, if a greater sum or a different relief were demanded, he may appear and contest the claim as unjust and unreasonable. It would seem to follow, and indeed is embraced within this rule, that where the demand is for judgment in federal currency generally, that is, in dollars and cents, a party cannot recover a judgment upon a default payable in a specific kind of money—gold coin, for instance—especially if the latter kind of money exceed the former in *actual value*. A different rule would prove a trap and snare for debtors, however honest they may be; and certainly could never receive the sanction of courts of justice. Indeed, our statute sets the question at rest. (Laws of 1861, p. 338, Sec. 147; *vide*, also, 11 Cal. 19, 20; Id. 91, 628.)

Secondly. It was not competent for the district court—it had *not* the power at the time the judgment in this case was entered—to order a judgment and sale to be paid and satisfied by gold coin only, or in any particular kind of money,

The action was upon a contract for the payment of money, enforceable only as at common law. The quality or character of the contract is in nowise altered because the debt thereby created has been secured by mortgage. The security is merely an incident to the debt contracted and sought to be recovered. At common law, when an action was brought on a contract for the payment of money, upon *proof of the existence of the debt*, the judgment of the court

was, that the plaintiff do recover his debt and damages, and that he have execution for the same, without any direction as to how the amount was to be paid or made. This function performed, the duty of the court terminated, and thenceforth the law declared how the amount adjudged should be satisfied.

*We have in this state adopted the common law, [*318] and our courts are subject to its mandates and provisions, both as regards their authority and the manner of proceedings, except when that law has been modified or changed by legislation. But we do not know of any rule of the common law or any statutory provision authorizing the district court to award such a judgment as that entered in this instance. Had courts possessed this power, independent of legislative sanction and authority, there would have been no necessity for legislation to enable them to specifically enforce the performance of contracts similar to the one presented for consideration in this case. In illustration of these views, we find the law-making power of our own and also of a neighboring state providing for a new remedy, and investing the courts, so far as it may, with the authority thought necessary to the specific enforcement of this class of contracts.

But in this state, the act commonly known as the "Specific Contract Act," was not in force at the time this judgment was entered. Therefore, whatever power that legislation may have conferred upon the courts, cannot be invoked in favor of this judgment. In this connection it may be proper to state that anything said in this opinion is not to be understood as having the slightest bearing as regards the effect and validity of that act.

Other grave questions of constitutional law have been raised by the learned counsel of the respective parties litigant. They involve the validity of the legislation, and the power of Congress to make the notes of the United States lawful money, and a legal tender in payment of debts. They have been ably and elaborately discussed in printed briefs furnished us, and the court has been requested to pass upon and determine them.

Points decided.

Were it necessary to the decision of this appeal that we should pass upon these questions, they could not be judicially avoided. But, as we view this case, these questions are extraneous, and do not necessarily arise. Hence, were we to consider them, our views could scarcely be authoritative in possible future controversies, where the same question might be directly involved.

The opinions of a judge upon a point not directly in issue are merely *obiter dicta*, and have not the force and are not entitled to the effect of an adjudication.

It is an established rule that courts will not adjudge whether a law be constitutional or not, unless they are imperatively called upon so to do by the admonitions of duty and the exigencies of the case.

Furthermore, counsel will find the views of this court, as to those questions, enunciated in the case of *Maynard v. Newman*, decided at the present term.

For the reasons above assigned, that portion of the judgment that required the amount to be collected in gold coin, and that the mortgaged premises be sold for gold coin only, is erroneous.

It is, therefore, ordered that the cause be remanded to the court below, with directions to modify the judgment by striking out so much thereof as orders and directs the collection of the amount in gold coin, together with that part which directs a sale of the mortgaged premises for gold coin only, and in all other respects the judgment is affirmed—the respondent paying the costs of this appeal.

EX PARTE WILLIAM JANES.

[1 NEVADA, 319.]

PARDONING POWER, HOW EXERCISED.—The governor of the Territory of Nevada had the right to pardon absolutely or conditionally, but no right to commute one punishment for another. He could not issue an order to confine a man in the penitentiary who had been sentenced to be hung.

IDEM.—The governor of the State of Nevada could not pardon without the concurrence of at least two other members of the board in whom the pardoning power is vested by the Constitution.

PARDON UPON CONDITIONS.—If a condition precedent be imposed, that con-

Opinion of the Court—Beatty, J.

dition must be performed, or the pardon never takes effect. If subsequent, the pardon becomes null and void on the breach of the condition.

THIS was an application for writ of *habeas corpus* made rectly to the Supreme Court.

The facts are stated in the opinion.

Clayton & Clarke, for Petitioner.

Geo. A. Nourse, Attorney-General, for the State.

*By the Court, BEATTY, J.:

[*320]

THIS was an application for the writ of *habeas corpus*, made returnable before this court, and the facts disclosed by the petition of the applicant and the return of the warden of the state penitentiary are as follows:

In the month of April, 1864, the petitioner was convicted of murder in the first degree, in Storey county. He was sentenced to be executed on the 2d day of June, 1864. The sentence recited the crime of which he was convicted, and directed that he should, between certain hours of that day, and at some suitable place, to be selected by the sheriff of Storey county, be hung. It did not, however, declare he should be hung by the neck, or hung until he was dead. Before the day of execution arrived the governor of the then territory of Nevada issued in his official capacity a paper purporting to be a commutation of the sentence of Janes, and directing him to be delivered over by the sheriff of Storey county to the warden of the territorial prison or penitentiary, and requiring the warden to hold him in prison during his natural life.

By authority of this paper and none other, he was delivered over to the warden some time in 1864, and by him retained in custody. On the 3d of December, 1864, J. W. Nye, then acting as governor of the state of Nevada, under the provisions of the Constitution which continued the territorial governor in that position until the election and qualification of the new state officers, issued another paper purporting, or *purporting to grant, a pardon to the [*321] petitioner, coupled with two conditions:

First. That the pardon should not take effect for six months.

Second. That the petitioner should leave the state Nevada, and not return thereto.

At the end of six months from the date of this paper warden of the penitentiary released the prisoner, and left the state.

Upon being informed by the warden that his authority to release him had been questioned, and a request made he would return and deliver himself up until the law governing the case could be settled, he voluntarily returned, and delivered himself to the warden, and sued out this writ.

The first question to be determined is, was James originally committed to the keeping of the warden by any authority? Under the organic act of the territory the governor had the power to pardon persons who had been convicted of murder. The general power to pardon carries with it the power to pardon on conditions. If a condition precedent be imposed, that condition must be performed or the pardon never takes effect. If subsequent, the pardon becomes null and void on the breach of the condition. (Bacon's Abr., vol. 7, head Pardon, Letter (E), and authorities there cited.)

Upon a breach of the condition, the party would be liable to arrest and execution. But as we understand the condition as applied to pardons, it is different from commutation. A condition is some act to be voluntarily performed by the party, or some one for him. A commutation is a change of one punishment known to the law for another different punishment also known to the law.

In neither case can the punishment be inflicted unless by authority of law. Now, whilst the governor of the territory had authority to pardon, he had none, we believe, to order the petitioner to be punished by confinement in the penitentiary. The warden was guilty of an illegal act in receiving him from the sheriff of Storey county and confining him in the penitentiary. The sheriff of Storey county was derelict in his duty in surrendering the prisoner [*322] to the warden. The paper *issued by the governor, not being a pardon, but a commutation, which *had no legal authority to make, was a nullity.*

Opinion of the Court—Beatty, J.

don issued on the 3d of December last was also a The State Constitution had gone into effect, and t Constitution the pardoning power is vested in a ve persons. It requires the governor and at least members of that board to concur in granting a This does not purport to have been done by any on than the governor.

ese views, it is apparent the warden of the peni- as no right to hold the prisoner. It is equally the sheriff should never have delivered the cus- e prisoner to the warden.

of the territorial legislature of Nevada in regard *corpus*, provides in section 26 as follows:

es where any party is held under illegal restraint ; and any other person is entitled to the restraint of such party, such judge may order such party mitted to the restraint or custody of such person w entitled thereto."

he provisions of this section the prisoner is ordered ered into the hands of the sheriff of Storey county, im held until further orders of the district court judicial district. Whether the original judgment he execution of the prisoner was sufficiently spe- ve justified the sheriff in carrying the sentence tion, need not be determined in this proceeding. the district court can enter a sufficient judgment. tisfied the sheriff had no authority to release the or to intrust him to the custody of any other per- ne jailer of Storey county or some deputy or bailiff iff for safe keeping.

Points decided.

THE HALE & NORCROSS G. AND S. M. CO., APPELLANT,
v. THE BAJAZETTE AND GOLDEN ERA
G. AND S. M. CO., RESPONDENTS.

[1 NEVADA, 322.]

WHEN AFFIDAVIT INSUFFICIENT TO CHANGE VENUE.—Affidavits which do not show that a fair and impartial trial cannot be had in the county where an action is brought, are not sufficient, under the twenty-first section of the practice act, to entitle a party to a change of venue.

[*323] * APPEAL from the District Court of the First Judicial District of the State of Nevada, Storey County, Hon. R. S. MESICK presiding.

Hillyer & Whitman and Thos. Sunderland, for Respondents.

Quint & Hardy and Harmon, for Appellant.

By the Court, LEWIS, C. J.:

A motion for a change of venue having been made in this case by the appellant, and the same having been denied by the court below, an appeal is taken to this court.

The affidavits upon which the application for change of venue was made, not showing that an impartial trial cannot be had in Storey county, are not sufficient, under the twenty-first section of the practice act, to entitle appellant to a change of venue; it was therefore properly denied.

BROSNAN, J., did not participate in this decision.

J. S. CROSMAN v. A. W. NIGHTINGILL.

[1 NEVADA, 323.]

LIEUTENANT-GOVERNOR—SALARY AS WARDEN OF STATE PRISON.—The law making the lieutenant-governor of the State of Nevada *ex officio* warden of the State prison, and allowing him a salary for such services, does not conflict with that provision of the State Constitution which provides that no increase of compensation of certain officers shall take effect during the term for which they have been elected.

ORIGINAL application for writ of mandamus in the Supreme Court.

The facts appear in the opinion of the court.

G. A. Nourse, Attorney-General, for Nightingill.

Thomas Wells and J. Neely Johnson, for Petitioner.

By the Court, *LEWIS, C. J. : [*324]

Application for a peremptory writ of *mandamus* to compel the controller of state, A. W. Nightingill, to issue a warrant to the state treasury for the sum of two hundred dollars, to be due the petitioner, Crosman, for one month's salary for his services as warden of the state prison.

The petitioner is the lieutenant-governor of the State of Nevada. At the last session of the legislature it was provided by law that the lieutenant-governor shall be *ex officio* warden of the state prison, and that he shall receive a compensation therefor of twenty-four hundred dollars per annum; and it is made the duty of the controller to draw his warrant on the treasurer in favor of the warden for such compensation at specified periods.

The controller, claiming that the law appropriating twenty-four hundred dollars salary to the warden is unconstitutional, refuses to draw his warrant in his favor for that proportion of salary now due.

One question only is raised in the case, *i. e.*, does this law conflict with those provisions of the Constitution which declare that the salary or compensation of officers shall not be increased or diminished during the term for which they are elected. The only constitutional provisions bearing upon this question are the following:

"The members of the legislature shall receive for their services a compensation to be fixed by law, and paid out of the public treasury; but no increase of such compensation shall take effect during the term for which the members of either *house shall have been elected; provided, [*325] that an appropriation may be made for the payment of such actual expenses as the members of the legislature may incur for postage, express charges, newspapers and stationery, not exceeding the sum of sixty dollars

Opinion of the Court—Lewis, C. J.

for any general or special session to each member; and provided, furthermore, that the speaker of the assembly and lieutenant-governor and president of the senate shall each, during the time of their actual attendance as such presiding officers, receive an additional allowance of two dollars per diem." (Art. IV, Sec. 33.)

"The legislature may at any time provide by law for increasing or diminishing the salary or compensation of any of the officers, whose salary or compensation is fixed in the Constitution; provided no such change of salary or compensation shall apply to any officer during the term for which he may have been elected." (Art. XV, Sec. 9.)

And section 5, Art. XVII, after fixing the salaries of all the state officers, except that of the lieutenant-governor, provides that "the pay of the state senators and members of the assembly shall be eight dollars per day for each day of actual service, and forty cents per mile for mileage, going to and returning from the place of meeting. No officer mentioned in this section shall receive any fee or perquisite to his own use for the performance of any duty connected with his office, or for the performance of any additional duty imposed upon him by law."

The only compensation or provision for allowing compensation to the lieutenant-governor is that in the thirty-third section. And by that it is only provided that if a certain duty is performed by him he shall receive a compensation of ten dollars per day. Is this such a compensation or salary as will prohibit him from receiving additional compensation for other duties which are imposed upon and performed by him?

The lieutenant-governor, as such, receives no salary or compensation, but only a per diem for services actually rendered in his capacity of president of the senate.

The constitutional restriction imposed by section 9, article XV, and section 33, article IV, is doubtless intended only to prevent the increase of salary or compensation of *officers, as such officers, or for duties naturally belonging to their positions, and can scarcely be extended to prevent the allowance of a compensation to

officers upon whom duties or responsibilities in no wise connected with their offices are imposed.

In the case of the officers mentioned in section 5, article VII, a different rule prevails, for they are expressly prohibited from receiving any fee or perquisite for the performance of any additional duty imposed upon them by law. The compensation which petitioner receives also being for a specific duty which he may perform, would raise the application that for any other duties imposed upon him, their compensation might be allowed.

But the most incontestible point in favor of the petitioner is that the salary which he receives for his services as warden is no wise an increase of the compensation of the lieutenant-governor as such officer, but he is appointed to another office, to which a separate and distinct salary is attached and independent duties are imposed.

It is not twenty-four hundred dollars per annum added to the compensation of the lieutenant-governor for the discharge of duties belonging to that office, but a compensation attached to another office to which he is appointed. There is nothing in the Constitution or the laws of this state prohibiting him from holding the two positions, and if he may hold both positions he may receive the salaries of both offices.

It would be putting a construction too restricted upon the Constitutional limitation to hold that the provision which prohibits the increase of salary or compensation would prevent the holding of two offices by the same person, or the receipt of the salary of both by the same individual.

We think the limitation in article XV, section 9, and article IV, section 33, should be confined to the increase of salary or compensation for the discharge of duties naturally belonging to a certain office, and should not prohibit compensation for the performance of other and independent duties in nowise belonging to it.

The peremptory writ of mandamus must therefore issue.

Opinion of the Court—Lewis, C. J.

A. B. PAUL & CO. v. W. H. BEEGAN & CO. ET AL.

[1 NEVADA, 327.]

JURISDICTION OF JUSTICES' COURTS.—Courts of justices of the peace being the mere creatures of statute, have no jurisdiction except that which is expressly granted to them by law.

IDEM.—The constitutional provision which makes it the duty of the legislature to "fix by law the powers, duties and responsibilities of justices of the peace," and which prohibits the legislature from conferring jurisdiction of cases in which the matter in dispute is a money demand, and the amount of such demand (exclusive of interest) exceeds three hundred dollars, does not extend the jurisdiction of justices of the peace, but only restricts the power of the legislature, and justices' courts could not by virtue of the Constitution alone, and without an act of the legislature under that Constitution, take jurisdiction of cases where the demand was three hundred dollars.

IDEM.—The Constitution merely confers a power upon the legislature, and does not, in this respect, define the jurisdiction of those courts.

APPEAL from the District Court of the First Judicial District, State of Nevada, Storey County, Hon. RICHARD RUSSELL presiding.

McRae & Rhodes, for Appellants.

Perley & De Long, for Respondents.

[329] Opinion by LEWIS, C. J., full Bench concurring.

Courts of justices of the peace being the mere creatures of statute have no jurisdiction, except that which is expressly granted by law. The laws of the Territory of Nevada limited the jurisdiction of justices of the peace in civil cases for the recovery of money, to demands not exceeding one hundred dollars, exclusive of interest. But it is claimed that the State Constitution extended that jurisdiction to three hundred dollars. The Constitution provides that "the judicial power of the State shall be vested in a supreme court, district courts, and in justices of the peace. That the district courts shall have original jurisdiction in all cases in equity, also in all cases at law which involve the title or the right of possession of real property or mining claims, or the

shall determine the number of justices of the [*330]
be chosen in each city and township of the
and shall fix by law their powers, duties and respon-
provided that such justices' courts shall not have
on of the following cases, viz.: 1st. Of cases in
matter in dispute is a money demand or personal
and the amount of the demand, exclusive of
or the value of the property exceeds three hundred

st point made by counsel for appellant is that, as
ial power in the State is vested in the supreme
strict courts and justices' courts, and as neither the
nor district courts have jurisdiction of cases where
claimed is less than three hundred dollars, the
on of such demands must be vested in the justices'
In other words, that all judicial power not granted
preme or district courts, and all jurisdiction pro-
to them in the Constitution are conferred upon
of the peace.

nly answer that need be made to this position is
he jurisdiction is not expressly granted to those
y law, no implication or necessity whatever can
upon them. And the argument that the omission
nstitution to confer jurisdiction of demands under
ndred dollars upon any courts whatever would be
g the obligation of contracts is certainly no reason
why such jurisdiction should be conferred upon
courts.

to the adoption of the Constitution, the district
d jurisdiction of all cases over one hundred dollars.
nstitution takes away any of that jurisdiction, and
conferred upon any other tribunal, and the obliga-
ontracts is thereby impaired, the result would be to
at jurisdiction in the district courts until it was com-

Opinion of the Court—Lewis, C. J.

ferred upon some others, and to suspend that provision of the Constitution taking that jurisdiction from the district courts until such time as the legislature makes some provision for such jurisdiction.

The Territorial law expressly limited the jurisdiction of justices of the peace to one hundred dollars. (Laws of 1861, p. 418, Sec. 610.) And the Constitution (Art. XVII, Sec. 2), declares that “all laws of the territory of Nevada in force at the time of the admission of this State, not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or be altered or repealed by the legislature.”

Is the law limiting the jurisdiction of these courts to one hundred dollars repugnant to the Constitution? It would seem not. That instrument confers no jurisdiction whatever upon justices of the peace, but leaves the entire matter to the legislature. Section 8 of article VI merely prohibits the legislature from conferring jurisdiction upon those courts in certain cases. This section declares that the *legislature shall fix by law* the powers, duties and responsibilities of justices of the peace.

If the Constitution itself fixes their powers and duties, why make it the duty of the legislature to do the same thing by law? It would be a strained construction to say that a constitutional grant of authority to the legislative power, to regulate a certain subject by law, is itself a regulation of it. If the Constitution confers jurisdiction of demands under three hundred dollars upon justices of the peace, it can only be by the implication that, as it limits the jurisdiction of the district courts to sums of over three hundred dollars, exclusive of interest, it must vest the jurisdiction of sums under that amount in justices of the peace. Those courts, however, cannot take jurisdiction by any such implication.

As this point disposes of the case, it is unnecessary to pass upon the others made by counsel for appellant.

Judgment below affirmed.

DECISIONS
OF
THE SUPREME COURT
OF THE
STATE OF NEVADA.
JULY TERM, 1865.

C. CARPENTER, RESPONDENT, *v.* JOHNSON & WADDELL, APPELLANTS.

[1 NEVADA, 331.]

WHEN INSTRUMENTS MAY BE STAMPED.—All instruments made prior to the 30th of June, A. D. 1864, if not stamped at the time of the execution, may be so stamped at any time afterwards.

¹EVIDENCE—OBJECTIONS TO MUST BE MADE IN THE COURT BELOW.—The failure of the plaintiff to prove the correctness of his book account, or that the entries were made at or about the time of the transaction, cannot be taken advantage of for the first time on appeal. If the point be not made in the lower court, it will not be passed upon in the appellate court.

²JUDGMENTS—PRESUMPTIONS IN FAVOR OF.—An appellate court will [*332] presume that the judgment of the lower court was sustained by the evidence in the absence of a showing to the contrary.

ASSIGNEE OF ACCOUNT.—An assignee of an account may sue on it in his own name, though the assignor have an interest in it. The assignor, in such case, need not be made a party.

APPEAL from the District Court of the Third Judicial District, State of Nevada, Lyon County, Hon. W. HAYDON presiding.

¹ When objections must be made in court below. See 5 Nev. 46, 349, 359; 7 Nev. 76, 84, 221, 226; 9 Nev. 371.

² 7 Nev. 174.

H. M. Steele, for Appellants.

F. H. Kennedy, for Respondent.

[*333] *LEWIS, C. J.,

The first assignment of error which we will notice in this case, is that the court below erred in admitting the assignment of Harrub & Co. in evidence: first, because it was not properly stamped, and second, because it does not purport to be the assignment of Harrub & Co., but of one Walter Harrub. The statement discloses the fact that the assignments of the accounts of Harrub & Co. and Birdsall & Co. to plaintiff, were not stamped until they were offered in evidence, when, by permission of the court, counsel for plaintiff attached the proper stamp to both assignments.

This mode of proceeding was entirely proper, and when an instrument is so stamped in court it may be introduced in evidence as if it had been properly stamped at the time of its execution.

Statutes at large for the years 1863 and 1864, p. 295, sec. 163, expressly provides for the stamping of all instruments made prior to the 30th of June, A. D. 1864, in the manner pursued by plaintiff's counsel in this case.

The assignment of Harrub & Co. having been signed by Walter Harrub individually instead of in the firm name, seems to be cured in this case by the testimony of Mr. Gall, one of the members of that firm, which clearly shows that it was intended as the assignment of the firm, though only signed by one of its members; the other members consenting to it, and charging the account so assigned to Carpenter on the company's books.

The question of whether the plaintiff should have proven the correctness of his book account, or that the entries were made at or about the time of the transaction, is a matter of no consequence here. As there does not appear to have been any objection of that kind taken in the court below, it can not be passed upon here.

Points decided.

The plaintiff himself was also called, and testified that the *defendants were indebted to him in the [334*] sum of five hundred and five dollars and forty-two cents, for work and labor performed for defendants, and for materials furnished. The books might, therefore, have been rejected entirely.

Whether this testimony is sufficient to sustain the judgment upon his account cannot be determined here, for the reason that there is nothing in the transcript showing that that was all the evidence to sustain it, and this court is bound to presume that the findings of the court below were sustained by the evidence, in the absence of evidence to the contrary.

Whether Carpenter was the only person interested in the accounts assigned to him cannot affect this case, for it is well settled that a note or account thus assigned may be used upon by the assignee in his own name. If the assignors, Harrub & Co. and Birdsall & Co. have any interest in the accounts assigned to Carpenter, he stands in the position of a trustee for them, and the statute expressly provides that "An executor or administrator, trustee of an express trust or a person expressly authorized by statute, may sue *without joining with him the person or persons* for whose benefit the action is prosecuted." (Stat. 1861, p. 5, sec. 6.)

The judgment below must be affirmed.

BROSNAN, J., did not participate in this decision.

TRUSTEES OF SCHOOL DISTRICT No. 1, RELATORS,
v. COUNTY COMMISSIONERS OF ORMSBY
COUNTY, RESPONDENTS.

[1 NEVADA, 334.]

ISSUES FOR SCHOOL PURPOSES DISCUSSED IN THE OPINION.

PETITION to Supreme Court for mandamus.

Orion Clemens, for Petitioners.

Opinion of the Court—Beatty, J.

Thomas E. Hayden, Prosecuting Attorney for Ormsby County, for Respondents.

By the Court, BEATTY, J.:

[*336] *This is a petition for a writ of mandamus to be directed to the respondents, requiring them to set apart certain moneys of the revenue collected for the taxes of the years of 1862, 1863 and 1864, for school purposes.

The statutes on this subject are numerous and somewhat confused. In the year 1861 there was a law passed establishing a common school system for Nevada Territory. That law is divided into five articles, and each article subdivided into sections. Sec. 2, Art. I, is in these words: "For the purpose of establishing and maintaining the common schools, it shall be the duty of the county commissioners of each county to set apart, annually, ten per cent. of all moneys paid into the county treasury received as taxes upon the property contained in such county, and the said moneys so appropriated shall be paid over to the county treasurer, to be appropriated for the hire of school-teachers in the several school districts, to be drawn in the manner hereinafter prescribed." Sec. 7, Art. II, is in these words: "For the ensuing two fiscal years there shall be set apart, semi-annually, five per cent. of all the moneys received as territorial tax, for school purposes, and such amount shall be distributed *pro rata*, according to the provisions of section 2 of this chapter" [article.] The first point to be determined, then, is, what was the intention of the legislature where they use this language: "To set apart, annually, ten per cent. of all money paid into the county treasury received as taxes upon the property contained in such county."

The first point which presents itself to our mind is, that it is obvious that this ten per cent. is only to be deducted from the property tax. It has no reference to *license* and other taxes.

The next question is to determine whether this ten per cent. is to be deducted from the gross amount of *all property tax* paid into the county treasury, or only that which is paid for county purposes.

The county treasurer is not only the agent for receiving the county taxes, but also the territorial taxes in each county. To give the literal meaning of the language used, it would be ten per cent. of all money received by the treasurer, whether *county or territorial. Yet it is evident [*337] the legislative body only had reference to money paid in to the treasurer as taxes for county purposes, and not to that which was paid to him for territorial purposes. The seventh section of article II. shows clearly it was intended only five per cent. of the territorial taxes should go into the school fund, and that was to come in an entirely different manner. The true intent, then, of this act is, that ten per cent. of all money paid to the county treasurers of Nevada as *property tax for county purposes* should be set apart for school purposes. Some amendments were made to this act in 1862, but do not in any way affect the questions we have been discussing.

In 1864 the school law was again amended in some small particulars. The only amendment affecting this question is as follows: "The following sections are hereby added to Article V.": [Secs. 14 and 15, which are added, do not affect the point under discussion.]

"Section 16. The board of county commissioners of the several counties (except Storey county) are hereby directed to levy a tax annually upon the taxable property of the county, according to the assessment valuation of the county assessor, not to exceed thirty cents on each one hundred dollars, nor less than ten cents, which tax shall be added to the county tax, and collected and disbursed in the same manner as other school fund money."

The only question in regard to this section is, whether it is a substitute for section 2d, article I., or an additional school tax. We have no hesitation in saying this is a special tax to be added to the ten per cent. provided for in section 2d, article I.

The act of 1865, while it repeals former school laws, provides "that the common school moneys or funds already accrued from taxation or otherwise, shall inure to the bene-

Opinion of the Court—Beatt, J.

fit of and belong to the public school funds provided for in this act."

These general propositions being settled, it is now necessary to examine the special laws in regard to taxation in Ormsby county.

The revenue law of 1861 only authorized the levying of sixty cents on each one hundred dollars for county purposes.

[*338] *There was at that time no law dividing the county revenues into different funds, except the law requiring ten per cent. of property tax to be set apart for school purposes.

The board of commissioners of Ormsby county, early in 1862, levied a tax of one dollar and fifty cents on one hundred dollars' worth of property, for county purposes, which they divided as follows: Six-tenths of one per cent. for county purposes (general fund), six-tenths of one per cent. for building fund, three-tenths of one per cent. for contingent fund.

In the fall, or rather winter, of 1862, this act of the board was legalized.

Although this tax is alleged to be levied for "general fund," "building fund" and "contingent fund," there is nothing in the action of either the board of legislature, so far as it appears before us, setting apart any portion of this tax to be applied *exclusively* for any particular object. There is nothing to prevent the clause in the school law which requires ten per cent. of all county property taxes to be set apart for school purposes operating on all parts of this revenue. We can see no reason why the ten per cent. clause in the school law should apply to that revenue raised for "general fund" more than that raised for "contingent fund" or "building fund." We think ten per cent. of the whole, one and one-half per cent. property tax, should have been set aside for school purposes.

In 1863, the commissioners of Ormsby county, whilst the law only authorized them to levy six-tenths of one per cent. property tax for county purposes, proceeded to levy a county tax of two per cent., or two dollars on the hundred, divided

follows: For "general fund" purposes, fifty cents; for "school" purposes, ten cents; for "cash contingent fund" purposes, ten cents; for "jail building fund," one dollar and thirty cents.

In the spring of 1864, the legislature legalized this act, and, in the law legalizing the same, made special provision that the one dollar and thirty cents levied for building purposes should not be appropriated for any other purpose except to pay the debt created for county buildings.

This special provision of the law of 1864 pre- [*339] scribes the second section of the first article of the school law operating on this fund.

Then the balance of the county tax is only seventy cents on the one hundred dollars, of which ten cents on the one hundred dollars, or *one-seventh* of the whole, is set apart for school purposes. The law is rather confused, but it is evident, to our mind, that this ten cents on the one hundred dollars was intended, both by the commissioners and the legislature, to be in lieu of, not in addition to, the ten per cent. of county property tax. This amount, as we understand from the pleadings and evidence, was set apart; so the relators have no ground of complaint so far as the revenues of 1863 are concerned.

In the year 1864, the county commissioners of Ormsby county levied a tax of two dollars on the one hundred dollars, for county purposes, divided as follows: Forty-five cents on the one hundred to a building fund, sixty cents to a current expense fund, fifteen cents to the school fund, and eighty cents for general and contingent fund.

The statute of 1864 (p. 92) clearly provides for the tax in favor of a building fund, and provides that it shall be applied to pay a certain debt without deduction for any other purpose, and it is not subject to that clause of the school law which sets apart ten per cent. of county fund for school purposes. The sixty cents current expense fund is also a special tax specially appropriated, and, like the forty-five cent tax, exempt from the operation of the ten per cent. clause in the school law. The fifteen cents goes entirely, and has gone, into the school fund, leaving no questions

 Opinion on rehearing—Beatty, J.

about that part of the tax. The eighty cents which was levied for general county purposes and a contingent fund is liable to the charge of ten per cent. for school purposes, and one-tenth of that, or eight cents on the one hundred dollars of taxable property, should have been added to the school tax, making in all twenty-three cents, instead of fifteen, for the school tax in the year 1864.

It is therefore ordered that the county commissioners of Ormsby county set apart, for school purposes, one-tenth part of any money now in the county treasury derived from the property tax of 1862, and paid into either the building fund or contingent fund; and as money may here-
[*340] after be collected *from the property taxes of 1862, payable to either the building fund or contingent fund, that one-tenth part of the same shall from time to time be set apart for said school purposes.

And it is further ordered that they set apart, for school purposes, ten per cent. of any money now in the treasury derived from the property tax of eighty cents on the hundred dollars levied in the year 1864 for a general county and contingent fund, and that they continue to set apart, for school purposes, ten per cent. of said fund as it may hereafter be derived from the said property tax of eighty cents on the hundred dollars for the year 1864.

 OPINION ON REHEARING.

LEGISLATIVE POWER TO PASS LAWS.—*Held*, That what purports to be a law passed by the legislative assembly in 1862, is not a law, because it was not approved before the adjournment of the legislative assembly. The governor of Nevada Territory was, by law, made a part of the legislative body; as such he could only concur in the passage of a law, whilst the other branches had a legal existence.

TAXES COLLECTED WITHOUT AUTHORITY OF LAW.—This court, in this proceeding, can make no order in regard to taxes collected without authority of law.

By the Court, BEATTY, J.:

THIS cause was argued and decided at a former term of this court. A rehearing was granted on the petition of re-

ponents. Upon a re-examination of the case we are fully satisfied with our decision so far as it relates to the taxes for the years 1863 and 1864.

In regard to the taxes of 1862, we probably fell into an error from not observing that what purports to be a law approved on the 24th day of December, 1862, and found on page 190 of the statutes of 1862, was approved and signed by the governor after the adjournment of the legislative assembly. That body adjourned on the 20th of December, and the bill was approved on the 24th of December.

The question arises, did the approval and signature of the governor on the 24th make it a law?

Section two of the organic act, after enumerating a number of the powers and duties of the governor, as executive officer of the territory, says: "And shall approve all laws passed by legislative assembly before they take effect."

Section four of the same act provides, among other things: "That the legislative power and authority of said territory shall be vested in the governor and legislative assembly."

Taking the language of the second section alone, it might well be contended that when a bill was passed by the two *branches of the legislative assembly it became a law, but a law suspended in its operation until signed by the governor. That if at any time after its passage, whether long or short, the governor should sign it, it would become operative.

On the contrary, if we look at the language of the fourth section, it appears that the governor forms one branch of the legislative body. No bill can become a law until it has received the sanction of three distinct legislative branches.

If we are to consider the governor as constituting one branch of the legislative body it would seem more reasonable to hold that he could do no legislative act after the other two branches had adjourned and ceased to exist as a legislative body.

Several acts at the session of the legislature in 1862 were approved by the governor after the adjournment of the legislature. The courts of the territory, we believe, generally treated these acts as invalid.

Points decided.

Such, we believe, has been the general view taken of these acts by the bar.

We are inclined to think that view correct, and shall hold that the bill referred to never became a law.

That being the case, the taxes collected for building fund and contingent fund in Ormsby county, between the 24th of December, 1862, and the 20th day of February, 1864, were collected without authority of law, and this court cannot, under this proceeding, make any order in regard to them.

On the 20th of February, 1864, a law was passed which possibly legalized the collection of so much of the building fund tax attempted to be levied in 1862 as then remained unpaid, but if it did legalize it, at the same time it was specially devoted to certain purposes, and thereby exempted from the operation of the school fund law.

We are satisfied no order should have been made in regard to the taxes of 1862. So much, then, of the order of this court heretofore made, as refers to the taxes of 1862, is hereby set aside and annulled. The order in regard to the taxes of 1864 will stand as heretofore made.

BROSAN, J., did not participate in this opinion.

JAMES S. BALLARD, APPELLANT, v. M. J. PURCELL
ET AL. RESPONDENTS.

[1 NEVADA, 342.]

APPEAL MAY BE TAKEN FROM AN ORDER MADE AFTER JUDGMENT.—The practice act of this State allows an appeal from a special order made after final judgment.

UNLIQUIDATED DAMAGES—HOW ASSESSED.—In an action for the recovery of unliquidated damages, where the defendant fails to appear, it is not necessary to call a jury to assess the damages; the court may either hear the proof itself or order a reference for that purpose. One of those modes must, however, be pursued. It is erroneous to render judgment by default without proof in such cases.

JUDGMENT WHEN UNDER CONTROL OF COURT.—During the term in which judgment is rendered the court has complete control of it, and upon a proper showing may set it aside.

APPEAL from the District Court of the First Judicial District, State of Nevada, Hon. CALEB BURBANK presiding.

Lindley & McQuade, for Appellant.

Quint & Hardy and Perley & De Long, for Respondents.

By the Court, LEWIS, C. J.:

This is an appeal from an order of the district court for the county of Storey, setting aside a judgment entered by default against the defendants Driscoll and Gage.

The order from which this appeal was taken was made on the same term in which judgment was entered.

Defendants' counsel relies entirely upon the point that no appeal can be taken from an order of this character. The record shows that judgment was entered against the defendants Driscoll and Gage, and that upon the next day after the entry thereof, the defendants, by their counsel, moved to set the same aside, which was done.

Sec. 285 of the practice act provides that "an appeal may be taken to the supreme court from the district courts in certain cases, among others from 'any special order made after final judgment.'" The appeal in this case is taken from such an order, and cannot therefore be dismissed.

It is also urged upon the argument of this case that judgment by default cannot be rendered in an action of this character where unliquidated damages are [*343] claimed, but that a jury should have been called to assess the same. This was unquestionably the common law rule, but section 150 of the practice act seems to ignore it entirely.

It provides the manner of entering judgment by default in two different classes of actions. First, where the action is on contract for the recovery of money or damages only, and there is a failure to answer, it is made the duty of the clerk to enter the default, and immediately thereafter to enter a judgment; in the second class of actions, default is entered in the same manner, but it is made the duty of the plaintiff to apply to the court for the relief demanded in his complaint; and it is also provided that "if the taking of an account, or proof of any fact be necessary to enable the court to give judgment, the court may take the account, or

Opinion of the Court—Lewis, C. J.

hear the proof, or may, in its discretion, order a reference for that purpose."

Here the power is clearly given to the court either to hear the proof itself, or order a reference in all this class of actions; and the following clause of the section, "and when the action is for the recovery of damages in whole or in part the court *may* order the damages to be assessed by a jury, is merely directory, leaving it discretionary with the judge to pursue that course or to find the facts himself, or order a reference for that purpose. Some one of these modes must, however, be followed; judgment by default cannot be entered in the class of cases mentioned in the second subdivision of section 150. The decisions in New York upon this question are contradictory and unsatisfactory, but the view which we take of it seems to be the only one authorized by the practice act. Indeed, no other construction can be placed upon the 150th section. It seems clearly to authorize the court below, in its discretion, either to hear the proof itself, find the facts and render judgment thereon, or to call a jury to assess the damages, or to order a reference to ascertain the facts.

In this case nothing of the kind seems to have been done but judgment by default entered without proof or any findings of fact. It was error, therefore, to enter judgment in that manner.

There is a further reason why the ruling of the court [*344] below* should be sustained. During the term in which a judgment is rendered the court has complete control of it, and upon a proper showing may unquestionably set it aside. Acting upon the rule that all the proceedings of a court of record are presumed to be regular, in this case we must presume that a proper showing was made to authorize the order of the Court. There is nothing in the record showing the grounds upon which the order was made, but only that the "court, being sufficiently advised;" ordered the judgment to be set aside.

The order of the Court below is therefore affirmed.

Opinion of the Court—Beatty, J.

BEATTY, J., concurring:

I concur in the judgment rendered; and whilst I cannot say that I dissent from any part of the reasoning or conclusions arrived at in the opinion, I am not fully satisfied but that the better interpretation of that part of section 150, which says the court *may* order the damages to be assessed by a jury, would be to hold that *may* is in that instance synonymous with shall, and that in all such cases it shall be the duty of the court to summon a jury to assess damages. That would be a safe practice. I am not fully satisfied that any other practice would not be erroneous. As the determining of this point is not necessary to decide this case, I make these suggestions that the point may be open for argument if it ever comes up in any other case.

CHARLES LAMBERT, RESPONDENT, v. E. B. MOORE,
APPELLANT.

[1 NEVADA 344.]

APPEAL, HOW TAKEN.—Under the laws of Nevada an appeal from the probate to the district court could only be taken by filing a written notice of appeal with the clerk and serving a copy on respondent.

NOTE.—“A notice of appeal given orally to respondents, even if given [“345] in open court and entered on the minutes of the court, is not sufficient to make an appeal and dispense with the filing of a written notice.

NOTE.—The filing and serving of a written notice of appeal must be followed by the filing of a proper undertaking, or the deposit in lieu thereof within five days, or the notice becomes inoperative and a nullity.

APPEAL from the Fourth Judicial District of the State of Nevada, Washoe County, Hon. C. C. GOODWIN presiding.

R. M. Clarke and Thos. Wells, for Appellant.

North & Harris, for Respondent.

By the Court, BEATTY, J.

This was an action brought in the probate court of Washoe County, for the recovery of a certain piece of land. The

Opinion of the Court—Beatty, J.

cause was tried in that court and judgment rendered in favor of respondent on the 11th day of November, 1864, for restitution of the premises described in his complaint.

It appears from the minutes of the court that upon the announcement of the judgment of the court, the appellant gave notice of appeal, and procured an order to be made staying proceedings for ten days, that he might make his statement on appeal.

On the 19th a bond on appeal to the district court was executed and filed.

On the 26th a statement on appeal was filed.

[*346] When the case came on for hearing in the district court, the counsel for respondent moved to dismiss the appeal. Upon what ground this motion was based or urged is not disclosed by the record.

The court overruled the motion to dismiss, but decided the case upon its merits in favor of respondent.

In the argument in this court, respondent urges the point that there was no appeal from the probate court to the district court; that the district court had no jurisdiction of the case, and should have dismissed the appeal on motion. This view of the case is based on two clauses of the practice act. Sec. 275, which relates to appeals in general, is in these words: "The appeal shall be made by filing with the clerk of the court, with whom the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a copy of the notice upon the adverse party or his attorney."

There is no written notice of appeal shown to exist, by the transcript; there is no attempt by affidavit or otherwise to show the loss of such a paper. The appellant relies simply upon a recital in the minutes of the court, that such a notice had been given. Admitting, for the argument, that the minutes of the court, if they clearly recited the facts of the filing, service, etc., of notice of appeal, would dispense with the necessity of producing a copy of the notice, evidence of its service, etc., let us see what these minutes do show. The language is as follows:

"Defendant's counsel gave notice of appeal, and it was

Opinion of the Court—Beatty, J.

that proceedings be stayed for ten days, to enable
t's counsel to make a statement."

ecital, with the most liberal construction, could
made to convey the idea that defendant's counsel
a written notice of appeal with the clerk, and
copy thereof on the adverse party, as he was by law
to do, in order to make an appeal.

is a total absence of even an intimation that such
given, had been served on the opposite party.
conclusion we come to from the reading of these
is, that the defendant, on the rendition
ent, announced *in open court his intention [*347]
l, and based upon that announcement a re-
stay of proceedings.

ould certainly be a proper practice. The intention
l by counsel would be a sufficient ground to induce
nder ordinary circumstances to grant a reasonable
roceedings.

nnouncement of intention is probably the notice of
luded to in the minutes. Such an announcement,
fully entered in the minutes, and although made in
ence of the opposite party (which is not affirma-
own in this case), would not be a compliance with
275 of the practice act, and would not make an

lition to the defective *notice* of appeal, there is an-
al defect in this case.

36 of practice act is in these words: "To render an
fectual for any purpose, in any case, a written un-
g shall be executed on the part of the appellant, by
wo sureties, to the effect that the appellant will pay
ges and costs which may be awarded against him
peal, not exceeding three hundred dollars: or that
l be deposited with the clerk with whom the judg-
order was entered, to abide the event of the appeal.
dertaking shall be filed, or such deposit made with
s, within five days after the notice of appeal is

f the minutes of the court show a notice of appeal

Points decided.

was so given as to make an appeal, it must have been given at or before the time of making the minutes referred to. These were made on the 11th of November. The bond on an appeal was not filed until the 19th of November, or more than five days after the notice. The language of this section is explicit, and it has been held in California, under the section of their act from which ours is copied, that if more than five days intervened between the notice and bond or undertaking, the whole proceeding is void, and no appeal is perfected.

We hold, then, that there never was an appeal perfected from the probate court to the district court. The judgment of the probate court stood just as if there never had been any attempt to appeal. Execution may issue on that judgment as on any other judgment of the probate court.

[*348] *The district court never had jurisdiction of the case as an appellate court, and consequently this court has none. The cause will be stricken from the calendar, and no judgment entered herein.

LEWIS, C. J., having been of counsel in the court below, did not participate in this decision.

SAMUEL CROSIER, APPELLANT, v. ROBT. McLAUGHLIN AND JOHN FULTON, RESPONDENTS.

[1 NEVADA, 348.]

PLEADINGS, HOW CONSTRUED.—The pleadings in this case, properly construed, admit a common possession but deny a common title or right of possession.

EQUITY—KNOWLEDGE OF, HOW ASCERTAINED.—When M. and F. act jointly in making a purchase of land, and F. has full knowledge of the nature and character of an equity which R. holds in the land purchased, and M. knows that R. asserts some equity, but does not know the nature, character, or extent of the equity claimed, nor the justice of its foundation, still both will be held to have purchased with full knowledge, for M., having heard of the claim of an equity and having failed to inform himself when having the opportunity to do so, is in no better condition than if fully informed. It is not in such case using due diligence to rely solely on the assertion of the vendor of the land that R. has no equity.

PARTY IN POSSESSION—LEGAL OR EQUITABLE TITLE OF.—It is immaterial when a party in possession files his bill claiming that he is a tenant in

Opinion of the Court—Beatty, J.

common with others, asking for a division of the land, etc., whether he shows that he has a legal title in common with the defendants, or only has an equitable title to the one-half of the land described. In either case he is entitled to substantially the same relief.

QUIT—WHEN PARTY NOT ENTITLED TO A JURY.—When a party files a complaint for equitable relief, and the whole case shows it must be determined rather upon the application of legal principles to admitted facts, than on the determination of controverted facts, the case should not be submitted to a jury.

APPEAL from the District Court of the Fourth Judicial District of the State of Nevada, Washoe County, Hon. C. GOODWIN presiding.

The facts of the case are stated in the opinion of the court.

North & Harris, for Appellant.

**Thos. Filch*, for Respondents. [*349]

By the Court, BEATTY, J.:

This was a bill filed for partition of real estate among several tenants in common, account of profits, etc.

The bill alleges that the plaintiff and defendants are the owners of the land in question, and are in possession thereof as tenants in common.

*The answer denies that "plaintiff and defend- [*350]
its * * are, * or ever have been, as tenants in
common or otherwise, owners of, and in the possession of,
tenants in common or otherwise, [of] the * * land."

In subsequent portions of the answer there is a denial of the allegation made in complaint that plaintiff was the owner of a half interest in the land, and a distinct averment that defendants were owners of the whole tract. But we do not think this answer is sufficient to deny the fact that plaintiff was, when the suit was commenced, in the joint or common occupancy of the land with defendants, and was claiming to be a tenant in common with them.

Indeed, it would seem, from the facts developed on the

Opinion of the Court—Beatty, J.

trial, that the answer was not intended to put in issue the allegation that plaintiff was occupying and using the premises in common with defendants, but merely to raise the question of his right to do so.

Whatever may have been the intention of the pleader, we hold this answer does not deny the common occupancy of the plaintiff and defendants, and this must be taken as an *admitted* fact in the case. The evidence would show this fact with reasonable certainty if it were not admitted, but it frees the case from embarrassment to start out with that as an admitted proposition.

The other facts of the case, about which there is no conflict of testimony, are as follows:

In the fall of 1860 John Johnson and Peter Rice agreed to locate a timber ranch. Johnson was to render some personal services in the location, and Rice was to pay all the money expenses, and they were to hold the ranch as equal partners, as they both state.

A survey was made at the request of both parties, by the county surveyor. Rice paid the surveyor and chain carriers, and when the survey was completed told the surveyor to make out the certificate of survey in the name of Johnson, for the reason, as would seem, that Rice held several other land claims, and was apprehensive of some difficulty in holding so much land in his own name.

After the survey was made neither party resided [*351] on the *land, and both of them, either in person or by means of hired men, cut timber from the ranch, and contributed labor towards felling trees, so as to make a marked boundary or fence around the ranch to exclude jumpers or other claimants from the premises surveyed. At the time the survey was made, one of the defendants, John Fulton, was in the employ of Rice, and was to have assisted as a chain-carrier, or something of that sort, in making the survey for Rice and Johnson.

Indeed, Rice, and we believe one other witness, says positively, he did assist in making the survey. Fulton himself says he was sick and did not assist the surveyor the day thi

Opinion of the Court—Beatty, J.

urvey was made, but does not deny that he knew it was being made for Rice.

His language is: "Rice and Johnson were going up to have the land surveyed. I was to go, but was sick and did not go," and much more to the same effect.

In the spring of 1862 there began to be some trouble about maintaining possession of the ranch, and Johnson, to avoid litigation, determined to sell out his interest in the claim. He applied to McLaughlin to buy. McLaughlin, after several conversations, agreed to purchase if Fulton would join him. Finally a deed was made to McLaughlin and Fulton for all the right, title and interest of Johnson in the land. There is nothing in the granting clause of the deed to indicate whether his interest was an entirety or a half interest. One of the covenants of the deed, however, would seem to indicate that he had a right to sell the entire premises described.

When McLaughlin purchased he says he was aware Rice claimed a part of this land, or an interest in it, but professes to have been ignorant of the nature and extent of his claim. He says he asked Johnson, and Johnson told him Rice had no claim; that he, Johnson, had promised Rice half of the land in consideration of a lot in Washoe that Rice was to give him; but Rice had sold the lot and should have none of the land.

McLaughlin claims that Johnson, after this explanation, sold him the whole of the land, declaring Rice had no interest. Johnson, who testifies, denies all this flatly; states positively that he informed McLaughlin he owned one-half of the land and Rice the other half; that he did not pretend to sell but one-half the land; that Mc- [*352] Laughlin knew he was buying but one-half; but told Johnson that Rice had suggested the deed might be made to him (McLaughlin) for the whole.

After McLaughlin and Fulton purchased they put up a cabin on the land, and they or their hired men occupied the cabin, and other parties attempted to take up the land, and two suits were brought for the land against McLaughlin and Fulton.

Opinion of the Court—Beatty, J.

The evidence is conclusive that Rice contributed to the defense of those suits, and that with the consent of both defendants. There is a great deal of other testimony, showing that during two years both defendants, by word and act, recognized the fact that Rice had an interest of some kind in the ranch. In the spring of 1864, the present plaintiff went on the ranch to assist one of defendants to cut logs for sale. Whilst so assisting defendants, he bought Rice's interest in the land, and after his purchase, and after a knowledge of such purchase came to the defendants, he was quietly permitted to remain on the ranch to assist in cutting the logs and draw a part of the proceeds of sale of logs. In many other ways defendants seemed to admit his right of possession there.

On the other hand, whilst this knowledge of Rice's claim, and tacit admission of his equity at least is brought home to defendants, it is stated by McLaughlin, on oath, and corroborated by other testimony, that from the moment McLaughlin got his deed he began to question Rice's right to half the property and to require Rice to settle or pay to him the amount of an old note and account which he alleges Rice owed him, and which he could not collect because they were barred by the statute of limitation. There is a great deal of testimony flatly contradicting McLaughlin in many particulars, but without deciding between him and conflicting witnesses, these facts and conclusions may be taken as fully established:

First. When Johnson executed the deed to Fulton and McLaughlin, Fulton knew exactly the nature and character of Rice's interest in the land.

Second. McLaughlin knew Rice *claimed* an interest in the land, and he had it fully in his power to inform himself of the nature of that interest.

[*353] *Rice lived in that neighborhood, he could have inquired of him, or in his absence from home, of his agent. He could have inquired of his own partner, who was conversant with the whole transaction.

It was not using diligence on his part (after having heard of an equity in favor of Rice) to rely solely on the



representation of Johnson. If Johnson was trying to make fraudulent sale of land, in which Rice had an interest, of course he was not the one of whom to make inquiry about Rice's title or equity. Fulton had full notice McLaughlin had such as to put him on inquiry, and he either as fully informed of the equity or willfully and fraudulently kept himself in ignorance.

Under the Utah statutes about surveys, and the rights required under them, and all the circumstances attending his case, it might be a difficult point to determine whether Johnson and Rice should be considered as tenants in common of this ranch, or Johnson considered as holding the legal title (so far as possession of public land can give title), with a resulting trust in favor of Rice for one-half of it.

In either event the rights of Crosier are the same. If they were tenants in common, the deed of Johnson only conveyed a half interest to McLaughlin and Fulton. If Johnson had the entire legal title, then he held one-half interest in trust for Rice, and they being purchasers with notice held it the same way.

The plaintiff is entitled to the relief sought in his bill.

This case was submitted to a jury, and they brought in a general verdict for defendants. On this verdict a judgment for costs was entered against plaintiff. The plaintiff moved for a new trial, which the court refused, and he appeals both from the judgment and order overruling the motion for new trial. The judge who tried the case in the court below seems to have refused a new trial, not because he was satisfied with the verdict, but because it was the second jury that had given the same verdict. Were it a common law case, that would be a very strong reason for not granting a new trial; but this was a chancery case that did not involve any important issues of fact. It depended on the application of legal principles which a jury were incapable of determining. It should never have been submitted to a jury.

*The judgment for costs and dismissal of complaint [*354] is set aside.

Opinion of the Court—Beatty, J.

The court below will decree a partition of the property, and take such steps as may be necessary to adjust the accounts between the parties, and give such other relief as the nature of the case may require.

LEWIS, C. J., having been counsel in the court below, did not participate in this decision.

JONES & COLLA, RESPONDENTS, v. O'FARREL, JAMES & CO., JAMES HILL AND WM. JAMES, APPELLANTS.

[1 NEVADA, 354.]

PARTNERSHIP—DECLARATION OF PARTNER, WHEN NOT BINDING.—One partner can only bind another in regard to the partnership transactions, and not by declarations about other and distinct affairs. Nor can an agent bind his principal, except in matters pertaining to his agency.

¹ **IDEM—WHO NOT PARTNERS.**—A party renting property and furnishing material at a stipulated price to a manufacturing company, wherewith to conduct their business, does not thereby become a member of the firm nor responsible for their debts. Nor is such party responsible for the debts of the company contracted in improving the property rented according to the terms of their lease.

² **IDEM—WHEN NOTICE NEED NOT BE GIVEN.**—A. and B. being partners in one particular business, A. is not bound to notify the world, nor any particular person, that he is not a partner with B. in a new firm into which B. has entered with other parties, and which new firm is doing business in a different name from that under which A. and B. always conducted their business.

APPEAL from the District Court of the Fourth Judicial District, State of Nevada, Washoe County, Hon. C. C. GOODWIN presiding.

The facts of the case are stated in the opinion.

W. C. Wallace, for Appellants.

North & Harris, for Respondents.

[*355] *By the Court, BEATTY, J:

This was an action brought against Jaspar O'Farrel, John James, William H. James, James Hill, J. W. Far-

Opinion of the Court—Beatty, J.

gton and E. A. Mier, alleged to be members of and composing the firm of "O'Farrell, James & Co.," to recover amount of a note executed by that firm, and also an account for articles furnished and charged to the same firm. There was no defense made by any of the defendants except William H. James and James Hill. They each of them say by separate answers that they were members of the firm of O'Farrell, James & Co. These were the only issues in the case. This case was tried by a jury on these issues, and the jury found against both the defendants. Various exceptions were taken by the defendants, Hill and William H. James, during the progress of the trial, to the admission of testimony. They both moved for a nonsuit at the close of the plaintiff's testimony, and both took exceptions to the various instructions given and refused. They also moved for a new trial, which was refused by the Court, and this appeal is taken from the order refusing a new trial, and the judgment in the case. The exceptions taken and assignment of errors are very numerous, and several of them well known.

It will not be necessary to notice them in detail, but we will briefly examine the facts of the case and point out some of the errors committed, and give our views as to the principles which should govern the case in any future trial. In the year 1861, a family, consisting of the father, John H. James, and several of his sons, among them William H. James, came from California to Washoe county, and commenced the erection of a quartz mill. The business was done in the name of John James, but William H. James was the principal manager, and held a power of attorney from his father. William H. James furnished most of the money to build the mill, and indeed seems to have been the principal owner, in fact; doing the business in the name of his father to avoid his California creditors.

Before the mill was finished, the James family fell short of funds, and applied to defendant Hill to join them in building the mill.

The application was made by William H. James, but he

Opinion of the Court—Beatty, J.

used his father's name and professed to act as attorney for the old man, but did not conceal the fact that he himself was to be benefited by the mill operations. Hill agreed to take a conveyance of one-fourth interest of the real estate, and become interested to the extent of one-fourth in the building of the mill.

He paid two thousand dollars and took a deed for an undivided fourth of the mill property. When this two thousand dollars was exhausted the mill was still unfinished, and the Jameses applied to Hill to advance the money to finish it. He did so, taking a conveyance of the entire mill property as security for what he had advanced over and above his share.

The mill was finished in the fall of 1861, and proved a failure. The owners stopped running for awhile. On the 31st of January, 1862, James Hill and John James, calling themselves the proprietors of the Napa Mill, entered into a contract with Farrington and Mier that they (Hill & James) would add twelve stamps to the mill, and lease to Farrington & Mier ground adjoining the mill, whereon to erect other improvements for reducing ores, etc. Hill & James were, when the mill was finished, to run the twenty stamps in crushing ore to be furnished by Farrington & Mier. Farrington & Mier were to pay Hill & James five dollars per ton as compensation for the privileges conferred on them by their lease for crushing the ores.

The entire power of the mill and the management of the reduction of ores was to be in the hands of Farrington & Mier, except the crushing of the ores in the batteries. That business was to be conducted by Hill & James.

Before Hill and James had made the contemplated improvements, (the addition of the twelve stamps), James agreed to become a partner with Farrington & Mier in their contract, thus becoming in effect lessee in a lease [357] *which he executed as one of the lessors. They conducted business in the name of James & Co.

And again, before the twelve stamps were in the mill, Farrington, Mier & James took in with them one Jasper O'Farrel, after which their business was conducted in the

Opinion of the Court—Beatty, J.

of O'Farrel, James & Co. O'Farrel became a partner July, 1862. Subsequent to this time the debts sued for in this action were contracted. The note was signed by O'Farrel with the firm name of O'Farrel, James & Co. The goods sold were charged to O'Farrel, James & Co. The only evidence, or pretended evidence, tending in the way to show that James Hill was a partner in the firm of O'Farrel, James & Co., were some declarations or statements made by William H. James. These were objected to by Hill's counsel, as hearsay evidence, and received notwithstanding his objection. This testimony seems to have been admitted on this theory by the court, that William H. James having been either an actual partner in the firm of Hill & James, or else the acknowledged agent of that firm, admissions he might make as to Hill's being a partner in the firm of O'Farrel, James & Co. would bind Hill. This is certainly not law.

In admitting Wm. H. James to have been a partner in the firm of Hill & James, or the general agent of that firm, all statements about the business of Hill and James would bind that firm, and of course would bind Hill as far as he was liable for the contracts of that firm. But it is not admitted that Wm. H. James was the agent of Hill in regard to any business except the company business of Hill & James, and his statements could not bind Hill in other matters. He could not bind Hill for the debts of O'Farrel & Co. by saying that Hill was a member of that firm. An agent can only bind his principal by declarations or admissions made within the scope of his authority as agent.

It certainly was not within the scope of his authority, as partner or general agent of the firm of Hill & James, to say that Hill was a partner in another and distinct firm. This erroneous judgment of the court below as to Hill's being bound by the statements of W. H. James, seems to have caused, at least, if not all, the errors committed by the court in the trial of this case.

There are other points insisted on by the respondent, [*358] which we will notice, to prevent future confusion on the trial of the cause. It is insisted that as the mill

Opinion of the Court—Beatty, J.

of which Hill was the part or sole owner was the capital or property with which O'Farrel, James & Co. did business, that therefore Hill had capital invested in business with that firm, and was responsible for their debts.

Upon the same principle, every landlord who rents a house to a mercantile firm would be responsible for the debts of that firm, because the landlord has property which the firm uses in their business. Such a proposition is absurd, and every one must see its absurdity when put in this form.

Yet that is substantially the proposition in this case. A part of Hill's mill property is rented by O'Farrel, James & Co. A part of it is used by Hill & James to crush rock for O'Farrel, James & Co., the latter firm paying Hill & James five dollars per ton for all rock crushed. How can this make Hill & James responsible for the losses of O'Farrel, James & Co.? The business of the two firms is entirely distinct, and one in no way responsible for the other. John James, and perhaps William H. Jamss, are members of both firms. As such, they may be responsible for the debts of both firms, but James Hill, because he is a partner of one or both the Jameses in the firm of Hill & James, is not therefore responsible for their debts in the firm of O'Farrel, James & Co., with which he had no connection. Nor is Hill responsible for the debts of O'Farrel, James & Co., because that firm contracted their debts, or a part of them, in putting improvements on Hill's property, in accordance with the conditions of their lease, as counsel seem to argue.

A landlord who leases property with a condition that certain improvements are to be made, in lieu of rent, is not bound for the debts of his tenant contracted in making those improvements.

Finally, it is contended that Hill was one of the parties who built the Napa mill. That the firms of Farrington & Mier, James & Co., and O'Farrel, James & Co., were all firms formed for the purpose of making additions and improvements to and on said property, and carrying on business in connection therewith. That this business [*359] was so nearly connected with the *business of Hill & James in building the mill, that it became the

Opinion of the Court—Beatty, J.

ty of Hill to notify all the world that he was not a partner in the firm of O'Farrel, James & Co.

Under many circumstances it is necessary for a retiring partner to give notice of his withdrawal from a trading or mercantile firm, to avoid responsibility for debts contracted after his connection with the firm has ceased; but we cannot conceive of a case where it would be necessary for a man to give notice he was not a member of a firm with which he had never been connected.

Farrington & Mier took a lease from Hill & James in the same place; certainly it was not necessary for Hill to say he was not a partner with his tenants. Afterwards John James, the two Jameses, perhaps, went into partnership with Farrington & Mier, and their business was conducted in the name of James & Co. Hill's name did not appear in the firm, and he is not shown to have had any knowledge of the formation of that firm.

Upon what principle could he be required to give notice that he was not a member of it? The mere fact that he had been a partner with James in another business, did not make it Hill's business to watch James and notify the world that he was not his partner in any new business connection he might form. We have noticed these points because they were insisted on by respondents, and because we are unable to determine from the instructions given and refused by the court, how far it may have been misled by these views of counsel. The court erred in allowing the statements of Wm. H. James to be given in evidence against Hill. It erred in refusing the motion for a nonsuit, as to Hill. It erred in the instruction given on its own motion, and erred in refusing most of the instructions asked by defendant Hill's counsel.

The judgment of the court below is set aside and a new trial ordered.

LEWIS, C. J., having been counsel in the court below, did not participate in this decision.

Opinion of the Court—Lewis, C. J.

E. RUHLING ET AL., APPELLANTS, v. J. M. HACKETT ET AL., RESPONDENTS.

[1 NEVADA, 360.]

PLEADINGS—GENERAL DEMURRER.—Misjoinder of actions cannot be taken advantage of on a general demurrer.

DEED CARRIES LEGAL TITLE TO GRANTEE.—A deed of conveyance, executed and delivered, carries the absolute legal title to the grantee, and if more land is by mistake conveyed than was intended by the grantor, it carries the legal title to that portion not intended to be conveyed, as well as that which it was the intention to convey, leaving, however, an equitable interest to that not intended to be conveyed in the grantor.

DEED—POWER OF COURTS OF EQUITY TO CORRECT MISTAKES.—Courts of equity have the power to correct mistakes in deeds and other executed instruments, so as to make them conform to the real intention of the parties, even to the extent of making a deed include more land than is embraced in it, where it was omitted by mistake, fraud or surprise.

ASSIGNMENT OF MORTGAGE.—The assignment of a mortgage usually carries with it all the equitable rights of the mortgagee growing out of it. The assignment of the mortgage is itself but the transfer of an equitable right of action to the assignee. With respect to the reformation of a mortgage, the assignee stands in the same position as the mortgagee.

PURCHASER—PROMISE TO PAY INCUMBRANCES.—Where the purchaser of real property agrees with the vendor to pay certain incumbrances upon it, as a part of the consideration of the conveyance, the person holding such incumbrance, or the person to whom such payment is to be made, may maintain an action upon such promise or agreement. Such an understanding or promise does not come within the statute of frauds, and need not be in writing.

APPEAL from the Second Judicial District of the State of Nevada, Ormsby County. Hon. S. H. WRIGHT presiding.

The facts appear in the opinion.

George A. Moore, for Appellants.

Clayton A. Clarke, for Respondents.

[1883] *By the Court, LEWIS, C. J.,

The bill in this case is brought to reform a mortgage, foreclose the same, and also to foreclose a vendor's lien.

The plaintiffs allege that on the 30th day of June, [1884] A. D. 1883, the defendant McKay made and delivered to one Lartman his promissory note in writing

Opinion of the Court—Lewis, C. J.

for value received he promised to pay to Henry , or order, the sum of three thousand dollars, in States gold coin, with interest at the rate of five per month; that to secure the payment thereof, McKey executed and delivered to Zartman his indenture of e, whereby he granted, bargained and sold to Zartman number nine in block number seventeen, in Carson city, which conveyance was intended as a mortgage. It is alleged that on the 4th day of August, A. D. 1863, Zartman, for value received, transferred and delivered the said note, and assigned and delivered the said mortgage to said plaintiffs. It is also alleged that at the execution of the note and mortgage above referred to, McKey was the owner of lot number six in block seventeen, in Carson city; that it was the intention of McKey and Zartman, and was understood and agreed by between them, that lot six, instead of lot nine, should be mortgaged in and covered by said mortgage; that it was not intended to mortgage lot nine at all, but only lot six; that the parties supposed that lot six was the one described in the mortgage at the time of its execution, but that, by mistake of Zartman or the draughtsman of the instrument, lot number nine was described and embraced in said mortgage, instead of lot number six; that at the time of making and execution of the note and mortgage, the defendant McKey had an interest whatever, in lot number nine; that in A. D. 1864, Mrs. Williamson, who owned lot number nine, conveyed the same to the defendant Clayton, at the same time McKey, by Mrs. Williamson, acting as attorney in fact, also conveyed all his right, title and interest in lot number six to defendant Clayton; that, for consideration of the sale to Clayton of the lots mentioned, he agreed to pay to the plaintiff the sum of three thousand four hundred and fifty dollars cash—the sum then due on the note and mortgage held by them, and that as a part of the consideration for the conveyance of the lots to him. It is also alleged that at the time, and on the day of the conveyance of the lots to him, Clayton was informed of and had full knowledge of the [*365]

Opinion of the Court—Lewis, C. J.

mistake in the mortgage, and of the intention of the plaintiffs to have the same reformed, so as to make it embrace and cover lot six instead of lot nine.

Plaintiffs allege further that though often requested, Clayton refuses to pay to them the four thousand four hundred and fifty dollars which he agreed and promised to pay. For the purpose of securing a lien upon lot nine, it is alleged in the complaint that the three thousand dollars loaned by Zartman, though borrowed by McKey, was in fact for the benefit of Mrs. Williamson, and that the entire sum so loaned, was by her expended in placing improvements on that lot, and that such improvements now constitutes its chief value. Upon these facts the plaintiffs pray that the mortgage assigned to them may be reformed so as to make it embrace lot number six; that that lot may be sold to satisfy their claim, and that they have a lien upon lot number nine.

To this complaint the defendant Clayton interposes a general demurrer. The only inquiry which can be presented upon this demurrer is, whether the complaint states facts sufficient to constitute a cause of action. Misjoinder of actions cannot be raised upon a general demurrer, and, therefore, if it were admitted that plaintiffs have united assumpsit with a bill in equity to reform a mortgage deed, it cannot be taken advantage of under the demurrer.

It is claimed by respondents' counsel that the mortgage, in this case, cannot be reformed so as to make it include land not described in it at the time of its execution, though it be admitted that it was written by fraud or mistake; that an instrument for the conveyance of land may be reformed so as to diminish the quantity conveyed, or agreed to be conveyed, but not to extend it to land not described in the deed or agreement, because it is said to order the conveyance of land which, by mistake or fraud, is omitted from the deed, is in violation of the statute of frauds which declares that no estate or interest in land shall be created, granted or assigned, unless by deed or conveyance in writing, signed by the party granting the same; but that order-

Opinion of the Court—Lewis, C. J.

g a reconveyance of land, which is conveyed by fraud or stake, is not in violation of this statute.

*For this distinction we find no authority but the [*366] dictum of Weston, J., in the case of *Elder v. Elder*,

Maine, 80, who, whilst acknowledging the authority of the case of *Gillispie v. Moon*, (2 John. C. R. 585), yet endeavors to draw the distinction above stated between the two cases. That distinction may have been clear and entirely satisfactory to the learned Judge who delivered the opinion in *Elder v. Elder*, but we must acknowledge it to be utterly beyond our comprehension.

In the case of *Gillispie v. Moon*, it appears the defendant had agreed to purchase two hundred acres of land from the plaintiff, but by mistake the deed embraced fifty acres more than was intended to be conveyed. The defendant, though acknowledging his mistake, insisted upon holding the entire two hundred and fifty acres. The court admitted parol testimony to establish the mistake, and upon its being established ordered the defendant to reconvey the fifty acres not intended to be conveyed, to the plaintiff. The deed from Mrs. Moon in that case unquestionably conveyed the legal title to the entire two hundred and fifty acres to the defendant, and left the grantor a mere equitable estate in the fifty acres not intended to be conveyed.

A deed of conveyance, executed and delivered, carries the absolute legal title to the grantee, and if more land is by mistake conveyed than was intended by the grantor, it carries the legal title to the portion not intended to be conveyed as well as to that which it was the intention to convey, leaving, however, an equitable interest to that conveyed by mistake in the grantor.

If the defendant Moon had conveyed the entire two hundred and fifty acres described in his deed to a *bona fide* purchaser, without notice of the mistake, such purchaser would undoubtedly have gotten a good title to the entire tract, which even the proof of the mistake would not defeat.

Is it not as much a violation of the statute of frauds to admit parol proof of the mistake in such a case, and to decree a reconveyance, as to decree a conveyance of land

Opinion of the Court—Lewis, C. J.

omitted from the deed? Where more land is conveyed than was intended, a reconveyance is decreed, and upon [*367] what authority? Merely *the parol proof that it was not intended to be conveyed, that the grantee in whom the legal title is vested by mistake ought not to be allowed to retain it. There is no agreement, either verbal or in writing, to reconvey, and yet it is admitted that in such a case the court may correct the mistake and order a reconveyance.

The case of *Gillespie v. Moon* is therefore as much within the statutes of fraud as any case for the correction of a mistake can be, as it decreed the conveyance of fifty acres of land by defendant to plaintiff whilst there was no agreement or memorandum in writing to do so.

It cannot be said that the conveyance by mistake of more land than is intended by the parties vitiates the deed as to that portion, and that no title to the portion so conveyed passes to the grantee. Such a rule might prevail as to simple contracts, but not to deeds conveying real estate.

But the rule that courts of equity have the power to correct mistakes in deeds and other instruments, so as to make them conform to the intention of the parties, is so universally recognized and acted upon, that it would seem scarcely necessary to do more than refer to a few cases which directly sustain our views upon this question.

It would be a reproach indeed to the equity jurisprudence of our country if it could justly be said of it that it is so trammelled in the meshes of inflexible rules that it cannot correct a mistake, or grant relief from the hardships of fraud and imposition, when, as in this case, the rights of innocent parties do not intervene, and the mistake or fraud is admitted by the defendant.

Can it be seriously claimed that if it be the intention of the grantor to convey, and the grantee to purchase, a valuable piece of land, and the consideration is paid, but by mistake a piece utterly worthless is described in the instrument of conveyance, that a court of equity may not reform such instrument so as to make it conform to the admitted intention of the parties? It is the peculiar province of

Opinion of the Court—Lewis, C. J.

ity to relieve from the consequences of fraud, surprise mistake; but it would illy merit our commendation if it were no adequate remedy in cases of such manifest injustice, of such frequent occurrence.

The question, however, is no longer *res integra*, [*368] the power of a court of chancery to correct such mistake is thoroughly established. (3 Stark. Ev. 1018, 1019; *Lis v. Henderson*, 4 Scam. 13; *De Reimer v. Cantillon*, 4 m. Ch. R. 85; *Wiswall v. Hall*, 3 Paige, 313; *Coleman v.oley*, 3 Dana, 486; *White v. Wilson*, 6 Blackf. 448; *Blodgett Hobart*, 18 Vt. (3 Washb.), 414; *Alexander v. Newton*, 2 st. 266; *Parkham v. Parkham*, 6 Humph. 287; *Rogers v.inson*, 1 Kelly 12; *Clopton v. Martin*, 11 Ala. 187; *Bailey Bailey*, 8 Humph. 230; *Baynard v. Norris*, 5 Gill. 468; *Kay v. Simpson*, Ir. Eq. R. 452; *Trout v. Goodman*, 7 o. 383; *Moseby v. Wall*, 23 Miss. 81; *Tilton v. Tilton*, 9 H. 385.)

In *Willis v. Henderson*, *supra*, by mistake a tract of land described in a mortgage was not the tract intended by the parties to be mortgaged; it was held, however, that the purchasers of the land intended to be mortgaged having notice of the mistake took it subject to the mortgage, and that a court of equity may correct the mistake and enforce it against the land in the hands of such purchasers. So in the case of *Blodgett v. Hobart*, where it appeared that by mistake part of the lands agreed to be mortgaged were not included in the mortgage deed, it was held that on a bill for that purpose a court of chancery would correct the mistake by ordering the mortgage to be so reformed as to include the land omitted.

In *Alexander v. Newton*, it was said that a mistake of a scrivener in drawing a deed, whether in law or in fact, will be corrected by a court of equity even against *bona fide* creditors.

So in *Clopton v. Martin*, the court held that where a written instrument expresses more or less than the parties intended, the court of equity will reform it. And Mr. Justice Corey, in *Taylor v. Luther* (2 Sumner, 228), uses the following language:

Opinion of the Court—Lewis, C. J.

“Nothing is better settled than that the true construction of the statute of frauds does not exclude the enforcement of parol agreements respecting the sale of lands in cases of fraud; for, as it has been emphatically said, that would be to make a statute purposely made to prevent fraud the very instrument of fraud; and the same rule governs [*369] in case of mistake *as of fraud.” Indeed, we are unable to find a single case which militates against the general rule that a court of equity will reform a mistake in all executed contracts.

There are many cases in which it is held, and perhaps the weight of authority sustains the doctrine, that a court of equity will not correct a mistake in an executory contract where the mistake is denied by answer, and enforce its specific performance as corrected.

But if the contract be executed, money paid and land omitted by mistake from the instrument which it was the intention of the parties to include, it would be a deplorable defect in the equity powers of our courts if relief could not be granted. This is the distinction made in all the cases and we think not a solitary case can be found where a court of equity has refused to reform a material mistake in a deed or mortgage, unless there were some defense besides the statute of frauds, such, for instance, as unreasonable delay upon the part of plaintiff. All the authorities relied on by the respondents' counsel where the reformation was refused are cases of executory contracts.

But it is said that even if such a mistake can be corrected in favor of the original mortgagee, that it is a mere equitable right of action which is not assignable.

The authorities, however, are directly opposed to this position. The assignment of the mortgage usually carries with it all the equitable rights of the mortgagee growing out of it. Indeed, the assignment of a mortgage is itself but transfer of an equitable right of action to the assignee. With respect to the right of reforming the mortgage, the assignee stands in the same position as the mortgagee (*Washburne v. Morrills*, 1 Day's Cases in Error, 139; *Gillespie v. Moon*, 2 John. Ch. R. 585.)

Points decided.

The complaint alleges that Clayton had notice of the mistake, and of the intention of the plaintiffs to have the same reformed, at and before the time of his purchase of lot number six. By demurring to the complaint, this fact is admitted, and he is therefore placed in the same position with respect to the reformation of the mortgage-deed as his grantors were. (*Blodgett v. Hobart*, 13 Vt. 414; *Villis v. Henderson*, *4 Scam. 13.) We are also of [*370] opinion that the plaintiffs may maintain an action against the defendant Clayton upon his promise to Mrs. Williamson to pay a certain proportion of the purchase-money. Such a promise is not a collateral promise in the nature of a guarantee of the debt of a third party, but is an original promise upon which the beneficiary may maintain his action direct. (1 Parson's Con. 390; *Hind v. Holdship*, 2 Watts. 104; *Arnold v. Lyman*, 17 Mass. 400; *Jackson v. Mayo*, 11 Mass. 152.) This is the generally recognized rule in the American cases; the English cases, however, do not maintain the same rule.

The judgment of the court below reversed and cause remanded, and leave granted defendant to answer.

ADOLPHUS WAITZ, APPELLANT, v. ORMSBY COUNTY,
RESPONDENT.

[1 NEVADA, 370.]

COUNTY COMMISSIONERS—RIGHT OF APPEAL AND OTHER REMEDIES.—Though section twenty-three of the act of 1861, creating boards of county commissioners and defining their duties, authorizes an appeal to the district courts from the decision of the board, it does not take away other modes of procedure provided by statute. It is not unusual to permit several modes of proceeding to obtain the same remedy, leaving it optional with the person seeking it to select either.

COUNTY MAY BE SUED.—Section one of "An act prescribing the manner and maintaining actions by or against counties," passed in 1861, authorizes actions to be brought and maintained against counties, and is not merely an act providing where such actions may be brought.

COUNTY COMMISSIONERS—AUTHORITY OF, TO BORROW MONEY.—County commissioners being creatures of the statute, have no powers beyond those expressly granted by the legislature. The statute not authorizing it,

Opinion of the Court—Lewis, C. J.

they cannot, therefore, issue a county warrant as collateral security for money borrowed. A warrant so issued would be utterly void.

IDEM—MONEY LOANED, HOW COLLECTED.—Money loaned to the commissioners for the benefit of a county, may be recovered from the county, with legal interest thereon, if it is shown that it was appropriated to the execution of an act which it is made the duty of the commissioners to perform, and the county has received the benefit of it. But nothing can be recovered which is not shown to have been expended for the use and benefit of the county, and for some purpose authorized by law.

[*371] *APPEAL from the District Court of the Second Judicial District of the State of Nevada, Ormsby County, Hon. S. H. WRIGHT presiding.

The facts appear in the opinion.

Robert M. Clarke, for Appellant.

Thomas E. Haydon and Charles E. Flandreau, for Respondent.

[*374] *By the Court, LEWIS, C. J.:

It is shown by the complaint in this action that on the 22d day of June, A. D. 1863, the county of Ormsby became indebted to one John Wagner in the sum of five hundred dollars; that such indebtedness was contracted in the manner following, viz.: On the 22d day of June, A. D. 1863, the said Wagner, at the special instance and request of the board of county commissioners of the county of Ormsby, paid to the said county for its use and benefit the sum of five hundred dollars, in United States gold coin; that the same was, by the board of commissioners of the county, appropriated to its use and benefit—that is, expended in removing certain paupers from the county; that to secure the payment of the money so paid, the county commissioners caused to be issued and delivered to John Wagner a

warrant on the treasurer of the county, directing him [*375] to pay to John Wagner the sum of fifteen *hundred dollars from the general fund of the county. It also appears, by indorsement on the back of the warrant, that it was understood and agreed, by and between Wagner and the board of county commissioners, that it should be held

Opinion of the Court—Lewis, C. J.

merely as collateral security for the payment of the five hundred dollars claimed to be due, with five per cent. per month interest thereon, which was to be paid on or before the 22d day of June, A.D. 1864. It is also alleged that the plaintiff, before the bringing of this action, became the owner and holder of the claim of five hundred dollars, and also of the warrant of fifteen hundred dollars, and that the sum of five hundred dollars with interest at the rate of five per cent. per month from the 22d day of June, A.D. 1863, is now due him from defendant.

Plaintiff prays judgment for the amount of his claim, and a decree authorizing the sale of the fifteen hundred dollar warrant to satisfy the same.

To this complaint the defendant demurs, assigning as grounds—first, that the court has no jurisdiction of the subject matter of said action, in this, that no action can be brought or maintained against a county upon an indebtedness of the same, but the creditor must resort to the officers of said county to have his account audited and allowed; second, the court has no jurisdiction of the party defendant in this action, because no action can be maintained against a county upon an indebtedness of the same; third, the complaint shows upon its face that the obligation upon which the action is founded is one which the board of county commissioners had no power to contract, and that they had no authority in law to issue the warrant set out in the complaint for the purpose therein alleged.

Upon this demurrer it is urged on behalf of the defendant, that this action cannot be maintained against the county, even if the debt had been properly contracted; that the proper remedy is by appeal from the decision of the county commissioners. The 23d section of the act of 1861, creating boards of county commissioners, and defining their duties, declares that “any person may appeal from the decision of the board of commissioners to the next term of the district court of the same county;” but there was no law requiring a person holding an account against a county, to present it to the board for
*allowance until the law of 1865. And whilst the [*376]

Opinion of the Court—Lewis, C. J.

section referred to may have authorized an appeal from the action of the board of commissioners disallowing an account, it certainly does not take away other modes of proceeding provided by statute. It is not unusual to permit several modes of proceeding to obtain the same remedy, leaving it optional with the person seeking it to select either. In this case, the mere provision that a "person may appeal," is not sufficient to authorize this court in holding that the only remedy against a county is to present the account, and if it is rejected, to appeal to the district court. It would seem more proper to hold that that course may be pursued, or any other provided by law, as persons choose.

It must be clear to all that if a certain mode of proceeding is provided by the statute, section twenty-three, giving another remedy, would not repeal or conflict with it, but both would stand together.

Is there then any law authorizing an action against a county upon an account? Sec. 1 of an "Act prescribing the manner of commencing or maintaining actions by or against counties," passed in 1864, provides that "actions against a county may be commenced in the district court of the judicial district embracing said county."

Counsel for defendant contend that this law merely declares where actions against a county may be commenced, and does not authorize any action to be instituted against them, other than those which could have been maintained before the passage of the law.

Though this law is not very artificially framed, it seems to have been the intention of the legislature to authorize the bringing of actions generally against counties.

And whatever construction this court, untrammelled by decisions, would feel disposed to place upon it, the decisions in California upon the same law leave no opportunity for construction. It has been repeatedly held by the courts of that state that this law gave the right to bring actions against counties. (*Gilman v. The County of Contra Costa*, 6 Cal. 676; 8 Cal. 52.)

It is further claimed that the commissioners had power *to contract the debt upon which this ac- [*377] is founded. Of this there can scarcely be a doubt. The statute expressly enumerates the powers of county commissioners; that of borrowing money is nowhere conferred upon them; and that such officers can exercise no powers except those expressly granted by the legislature, is too well established to admit of question. And the issuance of a county warrant as collateral security was as unauthorized as the borrowing of the five hundred dollars, and is therefore utterly void.

But it does not follow that because the commissioners had no right to borrow money that the plaintiff cannot recover the five hundred dollars advanced for the benefit of the county.

Though the contract between Wagner and the county commissioners was null and void, and would not authorize recovery upon it, yet if the plaintiff shows that the five hundred dollars advanced by his assignor was expended for the benefit of the county, and in a manner authorized by law, he may recover upon a count for money had and received. (2 Green. Ev., Sec. 117.)

The author says: "The count for money had and received, which in its spirit and objects has been likened to a bill in equity, may in general be proved by any legal evidence, showing that the defendant has received or obtained possession of the money of the plaintiff, which in equity and good conscience he ought to pay over to the plaintiff."

This proposition is well settled and seems to cover this case. If the money loaned by Wagner was expended in the execution of an act which it is made the duty of the commissioners to perform, and the county has received the benefit of it, it is legally bound to pay the money so appropriated to its benefit with legal interest thereon.

But nothing can be recovered which it was not shown was expended for the use and benefit of the county, and for some purpose authorized by law. No execution can, however, be issued against the county, but the judgment,

Statement of Facts.

if obtained, must be presented to the board of commissioners as provided by the law of 1865.

Judgment of the court below reversed, and cause remanded.

OPINION ON REHEARING.

[*378] *By the Court, LEWIS, C. J., on rehearing:

In the petition for rehearing in this case, counsel for defendant rely upon and urge the proposition that an action for money had and received cannot be maintained against a municipal corporation in a case of this kind.

This point was not made upon the argument of the case, but was fully considered by the court in arriving at its decision, and no reasons are now advanced which we deem sufficient to change our former conclusions.

No authorities were then cited in support of the position taken by the court on this point; but we take this opportunity of referring to the case of *Argenti v. The City of San Francisco* (16 Cal. 263), which directly sustains our conclusions on all the points in the case.

Rehearing denied.

D. M. DESMOND, APPELLANT, v. G. W. STONE,
RESPONDENT.

[1 NEVADA, 378.]

SURVEY OF LAND—RIGHT OF POSSESSION.—A survey of agricultural land made in accordance with the provisions of section two hundred and sixty-one of an act entitled "An act to regulate surveyors and surveying," gives the person for whom such survey is made a right of possession for one year from the time the certificate is recorded.

APPEAL from the District Court of the First Judicial District of the State of Nevada, Storey County, Hon. RICHARD RISING presiding.

The facts of this case appear in the opinion of the court.

B. C. Whitman and Isaac L. Shuck, for Appellant.

the Court, LEWIS, C. J.:

This action was brought to recover a tract of land consisting of about two hundred and forty acres, located in the town of Storey. The defendant denies the plaintiff's title, and avers that he is the lawful owner and entitled to possession thereof. By consent of parties the [*379] case was tried by the court, and the findings dis-

cover the following facts: That in August, A. D. 1863, the plaintiff caused the land in question to be surveyed by the county surveyor, and within thirty days thereafter the certificate of such survey recorded in the office of county recorder; and that afterwards he built, or caused to be built, a small house upon the premises, and placed a fence around the entire tract. It also appears that in April, 1864, about eight months after the survey, the defendant entered upon the premises, fenced about three acres thereof, built a small house thereon, and occupied the same from that time to the time of bringing this suit.

Upon these facts the court below rendered judgment in favor of the defendant.

The act of the year 1861, entitled "An act to regulate surveyors and surveying" (Statutes, section 267), provides that the certificate of the county surveyor of the survey of land, provided the same is recorded within thirty days after delivery thereof, shall be evidence of possession for one year from the date of record of such certificate. The requirements of the statute seem to have been fully followed by the plaintiff in this case.

By virtue of that survey, therefore, he must be deemed to have had possession for one year, regardless of whether he does any other act or not. The official survey for the period of one year amounts to the same as an actual and continuous occupation, and nothing further would seem to be required. This case must not be confounded with that of *Sankey v. Stone*, ante 68. In that case, no official survey was shown, and the parties relied upon actual possession only. But the survey in this case by the statute gives possession, and entitles the plaintiff to recover in ejectment as the actual occupation,

Points decided.

which in the case of *Sankey v. Noyes* we held to be necessary where no such survey was relied on.

Judgment of the court below reversed and cause remanded.

WILLIAM VAN DOREN, RESPONDENT, v. A. W. TJADER
J. D. WINTERS ET AL., APPELLANTS.

[1 NEVADA, 380.]

INDORSEMENT OF NOTE.—There can be no strict indorsement of a negotiable promissory note, except by the payee or indorsee.

CONTRACTS—INTENTION OF PARTIES GOVERN.—The intention of the parties to a contract is always the object which is to govern the court in its interpretation, and in ascertaining the rights and obligations of the parties to it.

CONTRACTS OF GUARANTY MUST BE IN WRITING.—The contract of guaranty to be effectual must be in writing, and must express the consideration upon which it is based. Where, therefore, a stranger to a promissory note endorses it in blank at the time of its execution, though he be guarantor of the note, yet he cannot be holden upon it where there is no such contract in writing expressing the consideration for his undertaking.

GUARANTOR OF NOTE.—WHAT NOTICE ENTITLED TO.—A guarantor of a promissory note will not be discharged by the failure of the holder to demand payment and give strict notice of non-payment. Reasonable notice of the dishonor of the note is all that he is entitled to.

CONTRACT OF GUARANTY MUST EXPRESS CONSIDERATION.—A contract of guaranty, though made at the time of the principal contract and upon the same consideration, must, nevertheless, be in writing, signed by the party to be charged, and must express the consideration which sustains it.

POWER OF APPELLATE COURT TO REVERSE JUDGMENT.—If an appellate court finds in the investigation of a case that the facts stated in the complaint, with all legal intendment in its favor, will not support the judgment, the court can do no less than reverse such judgment, although counsel may not have hit on the proper grounds for asking a reversal.

WRITTEN AGREEMENT WHEN PRESUMED TO BE LAWFUL.—Where the terms and conditions of an agreement are set out in a complaint, and a violation of that agreement is charged against the defendant; if it is such an instrument as the law requires to be in writing and the complaint is silent as to whether it was oral or written, courts will presume it to be lawful or written agreement until the contrary is shown.

WHAT A DEMURRER ADMITS.—The party demurring admits the truth of whatever is contained in the complaint and nothing more. A demurrer does not admit new facts.

CONSIDERATION AND PROMISE.—The promise to answer for the debt of another and the consideration for that promise, need not be contained in the same paper, provided the signature of the guarantor can be connected

Opinion of the Court—Lewis, C. J.

with both. A note imports consideration to the maker, but it does not import a consideration for a guaranty of its payment by a third party. **GUARANTY WRITING MUST SHOW CONSIDERATION.**—The intent of the statute of frauds seems to be that the writing itself, without extraneous evidence, should show the consideration for the guaranty.

APPEAL from the District Court of the Second Judicial District, State of Nevada, Ormsby County, Hon. S. H. FRIGHT presiding.

The facts are stated in the opinion.

Alnater & Flandreau, for Appellants.

Clayton & Clarke, for Respondents.

*384] *By the Court, LEWIS, C. J.:

This action was brought to recover the sum of three hundred dollars on a promissory note, which it is alleged in the complaint was on the 27th day of January, A.D. 1864, executed and delivered by the defendants to the plaintiff.

It is further alleged in the complaint that the defendants, Winters and Hopkins, signed the note as sureties; that they came and were original parties thereto, and joint makers of the indorsement of their names upon the back thereof, at the time of its execution and before the delivery of the same to the plaintiff.

It is also alleged that the defendant Tjader, at the time of making the note, and continuously since that time, has been, and now is, wholly insolvent, and that there is now due the plaintiff from defendants on said note the sum of three hundred dollars.

To this complaint the defendants, Winters and Hopkins, interpose a demurrer, assigning as grounds therefor that the complaint does not state facts sufficient to constitute a cause of action against them, in this:

First. That it appears by the complaint that they are not *primarily or originally liable on the note, [*385] but only secondarily and conditionally liable thereon as sureties for the maker, and have not been notified of the presentment to, demand of payment of, and refusal of payment by the maker.

Opinion of the Court—Lewis, C. J.

Second. That it appears from the complaint that the defendants, Winters and Hopkins, are indorsers, and not original makers of the note, and that no demand and notice is alleged.

Third. That it appears from the complaint that they signed the note as guarantors, and not as makers, and that it is not alleged that they have ever been notified of the non-payment and dishonor thereof by the maker, A. W. Tjader.

Two points are presented for investigation in this case:

First. What character does an irregular indorser in blank, of a negotiable promissory note, who signs his name upon the back at the time of the execution and delivery, occupy—whether he is to be treated as an original maker, a strict indorser, or as a guarantor; and

Second. What are his responsibilities?

The authorities, it must be admitted, are irreconcilably conflicting, and it cannot be said that any rule is now definitely settled; indeed, the only fact fully determined by the authorities is, that nothing at all has been settled. The earlier decisions in New York uniformly held an irregular indorser liable as the maker of the note. (*Manrow v. Durham*, 3 Hill, 584; *Luqueer v. Prosser*, 1 Id. 256; 4 Id. 490; *Miller v. Gaston*, 2 Id. 188; *Hough v. Gray*, 19 Wend. 208; *Ketchell v. Burns*, 24 Id. 456; *Allen v. Rightmire*, 20 John. 365.) But all these cases have subsequently been overruled, and an irregular indorser in blank, signing his name upon the back of a negotiable note at the time of its execution, is now held in that state to be an indorser, entitled to strict notice, and discharged by the failure to present for payment, and to give strict notice of non-payment. (*Spies v. Gilman*, 1 Const. 321; *Ellis v. Brown*, 6 Barb. 282; *Waterbury v. Sinclair*, 26 Id. 425; *Cottrell v. Conklin*, 4 Duer, 45.)

This same doctrine has been recognized in some other states, but no satisfactory reason is given for holding [*386] ing that an entire *stranger to a note, and one who never had an interest in it, should be held only as an indorser.

These decisions are also in direct conflict with the gen-

I rule that there can be no strict indorsement of a negotiable promissory note, except by the payee or an indorsee. The rule requiring the presentment for payment to the maker, and strict notice of non-payment to the indorser, in general embodies no principle of justice to recommend it to the favorable consideration of the courts. And as the strict legal rules governing the duties and liabilities of indorsers often work hardship and injustice, they should not be extended so as to embrace cases not already clearly within their scope. To extend it, therefore, to a class of cases not already within its scope would be abandoning the manifest purpose and spirit of the law for its rigorous rules.

The general rule governing the responsibilities of guarantors, on the other hand, is founded upon the clearest principles of equity, and has that at least to recommend its adoption where any doubt exists as to what rule should be followed.

In many of the states an irregular indorser in blank is *prima facie* regarded as a guarantor. (*Klein v. Currier*, 14 Id. 237; *Webster v. Cobb*, 17 Id. 459; *Carroll v. Weld*, 13 Id. 2; *Camden v. McKoy*, 3 Scam. 437; *Cushman v. Dement*, 1 Id. 497; *Smith v. Finch*, 2 Id. 321; *Carr v. Rowland*, 14 Id. 275; *Cook v. Southwick*, 9 Id. 615; *Watson v. Hart*, 1 Id. 633; *Clark v. Merriam*, 25 Conn. 576; *Beckwith v. Agell*, 6 Id. 315; *Perkins v. Cutler*, 11 Id. 213.) And this certainly seems to be much the most reasonable rule. The intention of the parties to a contract is always the object which is to govern the court in its interpretation, and in ascertaining the rights and obligations of the parties to it. If this rule should be recognized in these cases it would be difficult to see how a person not a party to a negotiable note, signing his name upon the back of it, could be treated as a maker. The very fact of the name being indorsed upon the back would be some evidence at least against the presumption of his intention to become primarily liable as a maker of the note. Deeming the position of guarantor in a case of this kind most consonant with justice, reason, and the intention of the parties, we feel bound to follow the rule as laid down in *Klein v. Currier* (14

Ill.), and the cases above cited; though under the statute of this state a mere indorsement in blank is not sufficient to establish the liability of such guarantor.

The authorities in California which hold that a guarantor is entitled to strict notice as an indorser, are contrary to long and well established rules in all the other states we have, therefore, no disposition to follow them.

With the exception of the decisions of that state which uniformly held that reasonable notice of demand and payment only is required, and even that is not required where the maker is insolvent at the time the note becomes due. (*Lewis v. Brewster*, 2 McLean, 21; *Foot & Bonbrun v. Brown*, Id. 369; 3 Kent, 121.)

The contract of guaranty is a separate and independent contract involving duties and imposing responsibilities different from those created by the original contract in which it is collateral.

It is a promise "to answer for the debt, default or discharge of another," and by the statute of frauds it is void unless there be some note or memorandum in writing, expressing the consideration upon which it is made, and for those reasons it has frequently been held that a guarantor cannot be jointly liable with the maker of a note, nor joined in the same action; but section 15 of our statute act ignores this rule, and expressly authorizes the joinder of a guarantor and the original obligor in the same action.

The contract of guaranty must, however, be in writing, signed by the party to be charged, and it must express the consideration. A mere indorsement in blank is not sufficient, nor are any words which do not express the consideration upon which the agreement rests. It has frequently been held by some of the highest courts of this country that when the guaranty of a promissory note is simultaneous with the making thereof, that the consideration of the note will sustain the guaranty; and as the holder of the instrument has the right to fill up the contract in advance with the intention of the parties, an irregular indorsement in blank was sufficient to answer the requirements of the statute. Whether those *dec

Opinion of Beatty, J., on petition for rehearing.

were correct or not, under the statutes upon which they were based, is a question of no consequence here, for the same courts which established that rule have subsequently, upon the amendment of the statute so as to make it like ours, held that the strict letter of the statute must be followed; that the contract of guaranty, though made at the time of the principal contract, and upon the same consideration, must be in writing, and must express the consideration which sustains it. These authorities are directly in point here, and clearly follow the plain letter of the statute. (*Brewster v. Silence*, 11 Barb. 144; *Glen Cove Mutual Insurance Co. v. Harrold*, 20 Barb. 298.) There are cases in California where it is held that the consideration expressed in the original obligation is sufficient to sustain the contract of guaranty made simultaneous with it, but none of them go so far as to hold that a mere indorsement in blank answers the requirements of the statute.

The complaint in this action clearly shows that there was no such agreement or memorandum in writing as the law requires on the part of Winters and Hopkins, but only that they indorsed their names upon the back of the note at the time of its execution.

The demurrer is therefore well taken, and the judgment of the court below must be reversed.

RESPONSE TO PETITION FOR REHEARING.

By the Court, BEATTY, J.:

The respondent in this case petitions for a rehearing, and urges his petition with much zeal and an elaborate reference to authorities.

The court did not come to the conclusion it arrived at in the case without doubt and reluctance.

We doubted the policy of holding that a party writing his name on the back of a note, under the circumstances stated in this complaint, should not be held responsible for the payment of the note. We found no case in which any court had *heretofore held that a party, under [*389]

Opinion of Beatty, J., on petition for rehearing.

such circumstances, was free from all liability; but, on the contrary, we found that whilst such parties were held liable, their liability was placed on three different and distinct grounds, wholly inconsistent with each other. One class of decisions have held that they were not guarantors or indorsers, but makers, and bound just as if they had signed the note on its face. A second class of decisions has held they were regular indorsers, and bound for the debt on condition of demand of payment from the maker and notice to indorser made and given in proper time and form. A third, and, perhaps, the most numerous class of decisions, has held that a party thus writing his name is a guarantor.

These latter decisions have uniformly held that when the guaranty was simultaneous with the note, the consideration of the note was the consideration of the guaranty, and a recovery could be had against the guarantor, under certain conditions, such as that the maker was insolvent, that a proper effort had been made to collect the note of the principal, or something of that kind. The decision of this court is divided into two main branches:

First. That appellants were guarantors, and not makers or indorsers.

Second. That being guarantors, they were not legally bound, because their guaranty was not in writing expressing the consideration therefor.

The first proposition, we think, sustained by reason and a multitude of authorities. We did not determine this point until after mature reflection and the examination of authorities: We remain satisfied with our conclusions.

After determining that those thus writing their names were guarantors, the next question was, what was the nature and measure of their liability? Upon this point we were compelled by the letter of our statute and by the authority of the New York courts, interpreting a statute precisely similar in language to ours, to hold that such guarantors were not bound, because there was no writing expressing the consideration of the guaranty. It is, however, to be observed that the New York cases which hold

Opinion of Beatty, J., on petition for rehearing.

guarantors not liable, are cases where they wrote over their names some words expressing the guaranty, such as "I hereby guaranty the payment of the [*390] note," or, "I guaranty the payment of the note," or other words of similar effect.

When the name is written in blank, the later decisions in New York have held the writer or the name to be an inserter. (See cases referred to in the original opinion.)

There is, then, *no one* decision sustaining both the legal positions laid down by this court in this case. But there is a large class of opinions sustaining the first proposition, as to the parties being guarantors, and a less numerous, but perfectly satisfactory, class sustaining the other positions; *that if guarantors*, they are not bound for want of consideration expressed in writing.

After this explanation of the difficulties we had to encounter in coming to a conclusion in this case, we will waive those particular objections to the opinion which are urged in the petition for a rehearing.

It is urged that the point on which this case was decided appears for the first time in the opinion of the court; that it was not raised by the demurrer, nor urged on the argument of the case.

It is certainly true that this point was not urged in the argument. It was only urged that defendants were not indorsers, but only indorsers or guarantors. If they were to be considered indorsers, they were not liable for want of demand on principal and notice of non-payment, and if as guarantors for want of notice of dishonor before suit, etc. The demurrer was because the complaint did not state facts sufficient to constitute a cause of action.

If this court finds in the investigation of a case that the facts stated in the complaint, with all legal intendments in favor, will not support the judgment, we can do no less than reverse it, although the counsel for appellants may not have hit on the proper grounds for asking a reversal. In this case appellants urge they are only guarantors, and not indorsers, because they were never notified of the dishonor of the note by principal.

Opinion of Beatty, J., on petition for rehearing.

The court holds with appellants that they were only guarantors, and hold that as such they were not bound, [*391] but for a *different reason than that assigned by counsel. This court cannot refuse to reverse an erroneous judgment, because it differs from counsel in the course of reasoning by which it arrives at the same result.

The petition suggests that it does not appear by the pleadings that Hopkins and Winters were to answer for the debt, etc., of another, and makes a quotation from the complaint, showing that it is charged they executed the note as makers, etc. But immediately following the declaration that they made the note, is the allegation that they made by indorsing their names on the back of it. The whole complaint must be taken together, and we held, and still hold, that this latter clause shows that they did not make the note, but that such an indorsement amounts only to guaranty. When the complaint is analyzed, it first says they made a note, then it says that they did not make it; thirdly, it says they wrote their names on the back of the note, but fails to state the legal effect of so writing the names. If this complaint fails to show appellants were answerable for the debt, default or miscarriage of another, it fails to show they were answerable for anything. The next position stated in the petition is: "That the pleading is not demurrable unless it affirmatively appears," etc. "That the promise was to answer for the debt, etc. * of another." "Second. That no note or memorandum thereof expressing the consideration was reduced to writing," etc. Certainly, if a pleading shows that the defendant, for a valuable consideration which is stated in the complaint, promised to pay something to the plaintiff which he had failed to pay, and does not affirmatively show that it was to be paid for the debt or default of another, that shows a *prima facie* cause of action on the part of the plaintiff. And if it so happens that the money was to be paid for the debt of another, the defendant must show that fact by plea or answer. In other words, when a complaint shows a *prima facie* cause of action, you cannot demur because you may suppose a state of facts to exist not inconsistent with the

Opinion of Beatty, J., on petition for rehearing.

d in the complaint which would defeat the action. So, where the terms and conditions of an agreement, and consideration upon which it was entered into, are set in a complaint, and the violation of that agreement is charged *against the defendant, if it is such [*392] agreement as the law requires to be in writing, the complaint is silent as to whether the agreement was oral or written, the court according to a number of adjudicated cases, will hold it to be a lawful agreement; in other cases, a written agreement, until it is shown to be otherwise.

But these propositions do not help respondents'

There is no direct allegation in the complaint that Kins and Winters promised or agreed to pay plaintiff except by executing the note. There is a subtextual allegation, showing they did not execute the note. If they were liable on any other promise, how is it shown? Only that they wrote their names on the back of a note contemporaneously with its execution. This does not show a *facie* cause of action against them. Therefore defendant may demur, and there is no necessity for plea or answer. An answer could develop no new fact.

The next point urged in the petition is that appellant admits making the contract, and do not interpose the plea of statute. The question here is whether the complaint is sufficient to support the judgment. The appellants, having admitted, admit the truth of whatever is contained in the complaint, and nothing more. A demurrer does not admit facts. Then admitting *arguendo* that if certain things had been done, they would have been liable as guarantors, but such an admission as can, in any manner, affect the judgment of the court. It is only admitting that to be law which the court finds is not law. The authorities cited by counsel refer to *facts* admitted in answers, not to admissions made in argument.

Counsel suggests that there is no substantial difference between our statute of frauds requiring the consideration to be expressed in writing, and the English statute requiring the agreement to be in writing, etc. As the English statute has been interpreted by the English courts, there

Opinion of Beatty, J., on petition for rehearing.

may possibly be no substantial difference. There certainly is none unless we draw a distinction between an agreement expressing a consideration and an agreement expressing *the* consideration. But as statutes containing language similar to the English statute have been interpreted in some of the states, there is a very great difference. In some [*393] states it has been held that if the **promise* of a defendant for the debt of another be in writing, the consideration may be proved *aliunde*. Under this construction of the statute, a guaranty not expressing the consideration would be held good if the complaint averred a good consideration. But if the English construction is held (that the writing must express not only the promise of the guarantor, but some consideration for the promise), or where a statute is passed expressly adopting the English construction, we cannot see how any guaranty of the debt of another can be held good, whatever the consideration of that promise, if it be not expressed in writing. We are satisfied, as counsel urges, that the promise to answer for the debt of another, and the consideration for that promise, need not be contained in the same paper, provided the signature of the guarantor be connected with both. But one or more papers signed by the guarantor must show the consideration of his guaranty.

Now, in this case, admitting the names written on the back of the note connected appellants with all that was written on the face, is there anything on the face of the note showing the consideration of their guaranty? A note imports consideration to the maker, but it does not import consideration for a guaranty of its payment by a third party. The intent of the statute seems to have been that the writing itself, without extraneous evidence, should show the consideration for the guaranty. How could one, from reading this note and seeing the names written on the back of it, ever infer that the guarantors had received a consideration for writing their names, or that the payee had ever parted with any right to induce them to write their names?

The apprehension expressed by counsel, that the decision

Opinion of Beatty, J., on petition for rehearing.

in this case will overturn the whole doctrine of liability of indorsers of bills of exchange and negotiable notes, is, we think, unfounded. Where the payee or indorsee of a note or bill indorses it and puts it in circulation, it is, in effect, a sale of negotiable paper, and in selling it he guarantees if it is not paid he will take it up. The primary object of the guarantee is to effect the sale of his property. It is not to become the surety of another. Such contracts do not come within the spirit of the act, and never have been, and probably never will be held to come within its operation.

*It is suggested that our statute of frauds is a [*394] literal copy of the statute of California, and being adopted from the statute of that State, we are by a well established doctrine bound to take the California construction of the statute. This is certainly the general rule, but subject to some exceptions. When the language of a statute is so plain it will admit of but one construction, we cannot give it another and absurd one, because it has been so construed in a neighboring state. But in this case our statute is a literal copy of the New York statute as well as of the California statute. Why should we be bound to follow the California construction any more than the New York construction? We think the New York courts have construed the language of the statute according to the natural import and meaning of the language used. On the contrary, the courts of California have entirely nullified the act and dispensed with its operation in certain cases. We prefer to follow those courts that enforce the law as the legislature has made it, rather than assume legislative functions and modify the law so as to meet our views of what it ought to be in certain cases.

The petition for rehearing is denied.

Opinion of the Court—Beatty, J.

STATE OF NEVADA, RESPONDENT, v. JOHN O. EARL
ET AL., APPELLANTS.

[1 NEVADA, 394.]

TAXATION, PROPERTY SUBJECT TO ANNUAL TAX.—All tangible property within the State of Nevada is subject to *one* and only one annual tax. Each acre of land, and each piece of coined money, is liable to this tax. But the property which was taxed in the hands of A., on the first Monday of May, could not subsequently, that year, be taxed in the hands of another.

IDEM—TAX ON MONEY IS A TAX ON THE CHOSE IN ACTION.—A tax on money at interest, secured by mortgage on land, is neither a tax on the pieces of money loaned, the land on which the mortgage security is taken, nor upon the paper on which the promise to pay is written. But it is a tax on the *chose in action*, or right to collect the debt.

CHOSE IN ACTION FOLLOWS THE PERSON.—*Chose in action* follows the person of those having the right. When the holder of such right resides out of the state of Nevada, this state has no jurisdiction over the person nor over the thing proposed to be taxed, and cannot tax either.

APPEAL, WHEN CANNOT BE TAKEN.—This court has no jurisdiction to try an appeal from an order sustaining a demurrer where no judgment has been rendered.

R. M. Clarke, for Appellants.

Thomas E Haydon, for Respondent.

[*396] *By the Court, BEATTY, J.:

This was an action brought in the name of the state of Nevada, to recover eight hundred and thirty-seven dollars and fifty cents, claimed from the appellants as taxes due for the year 1864, on thirty-three thousand five hundred dollars of money at interest, secured by mortgage recorded in Ormsby county.

The defendants answered, setting up these facts: That they were, during the year 1864, from the first Monday in May to the first Monday in November, both inclusive, residents of the state of California, and at no time within that period within the state of Nevada. That during the same period, their note and mortgage evidencing and securing the debt or *chose in action* attempted to be taxed, were in California, and without the jurisdiction of the state of Nevada. That during that whole period they had no money at interest or other personal property within the state of

evada, and were not liable to any tax on personal property within said state. At least, in the argument of this case, each were assumed to be the substantial allegations of the answer. With the views entertained by the court in this case, it is not necessary to make any critical examination of the pleadings to see whether they do, or do not sufficiently make the points relied on in the argument.

A demurrer was interposed to this answer in the court below, on the ground that it did not state facts sufficient to constitute a defense to the action. The court sustained the demurrer and gave leave to the defendants to amend within twenty days. Without waiting for the expiration of the twenty days, or the rendition of judgment upon [*397] failure to amend, defendants appealed from the order sustaining the demurrer.

Upon this state of facts the case was argued in this court without any suggestion or objection that the appeal was not properly taken.

The court, believing an expression of opinion on their part, upon the points presented in argument, might save much trouble to the tax-assessors, tax-collectors, and other state officers charged with the collection of revenue, will, notwithstanding the irregular manner in which this case comes up, state their views of the law in regard to taxing money at interest, secured by mortgage or otherwise.

In the first place, all land or real estate in this state (except government land and a few other classes of property especially mentioned in the revenue act) is subject to taxation. This burden is laid on land equally, according to its value, without any regard to the fact as to whether it is or is not mortgaged.

Secondly, all money in the state on the first Monday of May in each year is subject to taxation, and, if taxed, a lien relates back to that day in favor of the state, according to the letter of the statute, upon each piece of gold or silver coin within its limits. A lien also accrues, or may accrue, if the tax-collector finds it, on each piece of coin that may come into the state between the first Monday of May and November of each year; but the same coin which was taxed

Opinion of the Court--Beatty, J.

in the hands of A on the first Monday of May, could not again be taxed in the hands of B a week afterwards.

The true theory of the statute is that each piece of tangible real or personal property within the state between the first Monday of May and the first Monday of November, each inclusive, should be taxed *once* at its true value, and *only once*. These preliminary remarks have been made because in the argument of this case there seemed to be some difficulty in determining in the minds of counsel what the State could tax and what it had taxed. The tax, however, upon "money at interest secured by mortgage," is, in the opinion of this court, neither a tax on coin, which is taxed as tangible personal property, a tax on the land [*398] mortgaged, which is taxed at its *value, without regard to the mortgage, nor a tax on the piece or pieces of paper upon which the note and mortgage are written, but it is a tax on a *chose in action*; in other words, it is a tax on the right which a party has to receive or collect a certain amount of money. *Choses in action* are intangible, and have no locality separate from the person possessing the power to enforce the right.

All *choses in action* follow the person of the owner. No doubt the state may tax such rights when held by its citizens, but if a party lives in another state, this state has no jurisdiction or control over the person of such non-resident and none over the *chose in action*, because it has no location or tangibility in this state. The same debt might be secured by separate and distinct mortgages in twenty states at the same time. If the recordation, then, of a mortgage in this state would fix the *situs* of the *chose in action* here the recordation of other mortgages would fix it in nineteen other states at the same time, and each state would have a right to tax this same *chose in action* within its own borders thus levying twenty annual taxes on the same property within the same year, which would be a manifest absurdity.

The state can only tax such *choses in action* as belong to its own citizens or residents. This court has no jurisdiction to try an appeal from an order sustaining a demurrer in a civil case where no judgment has been rendered.

Opinion of the Court—Beatty, J.

The consent of all parties or waiver of the point by respondent cannot confer jurisdiction; we are therefore compelled to dismiss this appeal.

D.E. EASTERBROOK, RESPONDENT, v. M. UPTON, ET AL.,
APPELLANTS.

[1 NEVADA, 398.]

WHEN APPEAL DOES NOT LIE.—An appeal from an interlocutory order granting a temporary injunction, will not be sustained when such interlocutory order was suspended by a final decree before appeal taken.

PRACTICE ON OVERRULING DEMURRERS.—The proper practice when a demurrer is overruled is to give time to replead.

Clayton & Clarke, for Appellants.

Atwater & Flandreau, for Respondent.

*By the Court, BEATTY, J.:

[*400]

On the 30th day of January, 1863, Upton obtained and docketed a judgment against one Remington in Ormsby county. Remington, at the time, owned a piece of real estate in that county known as the St. Charles Hotel. On the 13th of January, 1865 (seventeen days before Upton's lien expired), Remington sold the St. Charles property, or his interest in it, if any interest he then had, to Easterbrook. Soon after the sale of Remington to Easterbrook, and while the lien was still in existence in favor of Upton (unless it had been divested by sales under former judgments), but within about thirteen days of its expiration by statute, Upton caused an execution to be issued on his judgment, and to be levied on the St. Charles Hotel, and possibly other property. The respondent Easterbrook then filed his bill praying for an injunction, perpetually enjoining the sheriff of Ormsby county and Upton from selling the said hotel property under said execution. The bill seems to be based on two distinct grounds:

First. That though Upton's lien had not expired by limitation when the execution was issued and the levy made, yet the two years had expired before the bill was filed and

Opinion of the Court—Beatty, J.

before any sale was made. That as the lien was to expire by limitation on the 30th of January, 1865, a levy made on the 17th of January, 1865, could not prolong that lien until some day in February, when the sale was advertised to take place.

The other ground taken was that Easterbrook had acquired title to the St. Charles Hotel through other judgments, prior in date and lien to the judgment of Upton, "which were and are indefeasible by any right of said defendant, M. Upton, under his said judgment against the aforesaid property."

To this complaint a demurrer was filed upon the [*401] general *grounds that it did not state facts sufficient to constitute a cause of action.

The demurrer was argued, considered, overruled, and a decree entered giving all the relief asked, and perhaps more than was asked. It does not appear whether the argument of demurrer was on the same day it was overruled or not, nor whether defendants or their attorneys had notice of the ruling of the court, and an opportunity to ask for leave to answer.

It does appear that the decree was entered the same day the demurrer was overruled. We allude to these facts in relation to the time of sustaining the demurrer and the entering of the decree merely to suggest that it would be a proper practice in all cases where a demurrer to a complaint is overruled, to give some notice of the ruling to the party against whom it is made, and afford an opportunity to answer.

We cannot determine, in this case, whether there was a denial of such opportunity to the defendant, or whether the immediate entry of the decree without notice was error, for the reason that there appears to be no appeal from the decree. The appeal is only from an interlocutory order granting a temporary injunction. That order has been superseded by the decree for a final and perpetual injunction. It would be mere folly in this court to set aside an order which was already *functus officio* before the appeal was taken.

Statement of Facts.

only points presented in the argument of this case on either side, was as to whether Upton's lien, due of judgment docketed January 30, 1863, could be enforced by the levy of execution up to the day of sale in January, 1865, so as to squeeze out the title which Easterman acquired by deed from Remington, dated January 13,

there is some difficulty on this point, and we are not disposed to express any opinion thereon, as there is no appeal from the decree made in the case. If we understand the facts as to the other branch of the case, that Easterman had purchased the St. Charles before he filed his bill, and had obtained executions on senior judgments, and had obtained sales under those purchases, we think this would have been sufficient reason for enjoining the sale under Upton's execution, and we do not see how this [*402] could be shown as to the extension of the lien could ever have arisen. The facts on this branch of the case are not fully and precisely stated as they should have been. If, however, the facts are not such as we suppose them to be in the complaint, the true facts should have been shown in answer.

The court have not noticed any supposed errors in the final decree because there is no appeal from the judgment. The bill is dismissed.

The judgment in favor of respondent for his costs.

Justice, C. J., did not participate in this decision.

BROWN, APPELLANT, v. GEORGE D. ROBERTS,
RESPONDENT.

[1 NEVADA, 402.]

NOTION OF LAND.—Facts necessary to constitute possession of land dismissed.

APPEAL from the District Court of the First Judicial District, State of Nevada, Storey County, Hon. RICHARD RISINGBROOK, Judge.

* Facts appear in the opinion of the court.

Hillyer & Whitman, for Appellant.

[*403] **Taylor & Campbell*, for Respondent.

By the Court, LEWIS, C. J.:

Ejectment to recover a piece of land located on Ame Flat, in the county of Storey. It appears from the evidence that the premises in dispute were a small portion of a ten-acre tract located by one Orvis, in the year 1863. About the time of the location he built a small house on the ground, placed stakes around the entire tract, dug a spring thereon, and resided upon the premises from that time until the conveyance to the plaintiff. Immediately after the conveyance to him the plaintiff erected a fence around the ten acres, and erected a dwelling-house and saloon within the inclosure. It appears that in 1863, and before the conveyance to plaintiff, the defendant erected a small toll-house on the premises near the spring, and continued to occupy it for that purpose, apparently by the permission of Orvis, plaintiff's grantor.

After the conveyance to plaintiff, and after he had erected his house and saloon, and inclosed the land, defendant claimed to a portion of the ten acres about one hundred square, which included the spring and the toll-house. [*404] and fenced the *same. This action is brought to recover the small lot of land thus inclosed by defendant. Verdict for defendant; plaintiff appeals.

There seems to have been some evidence before the jury from which it might be inferred that defendant and grantors acquired a right or license from Orvis to build a toll-house in question on the premises, and the plaintiff seems to have purchased subject to that right; but there appears to be no testimony from which it would be inferred that anything more was granted than the bare right to build and occupy a toll-house. It is only necessary, therefore, to inquire whether the plaintiff had such a possession of the ten-acre tract as is required by the law at the time the defendant began to inclose the lot in dispute. Whether

Opinion of the Court—Lewis, C. J.

plaintiff's deed extended his possession to the boundaries described therein need not be determined in this action, for we think it is clearly shown that the plaintiff had acquired actual possession of the entire tract (except that actually occupied by the toll-house) by his inclosure and residence thereon before the defendant indicated his intention to claim anything more than the right to the toll-house. Prior to the inclosure by the plaintiff, the defendant seems never to have claimed any other right; he had done nothing—neither fenced, surveyed, driven stakes, nor in any manner manifested an intention to claim any land beyond that upon which his building stood.

Neither the character of the building nor the purpose for which it was erected is such as would lead any one to suppose that any land except that which was covered by it, and to access to the road if it is not directly on it, was necessary to its complete enjoyment.

At the time the plaintiff purchased there he had good reason to believe that defendant claimed nothing but the house, and perhaps the land which it covered. If it were admitted, then, that the plaintiff acquired no title whatever from his grantor, his own acts were amply sufficient to give him title against defendant, who had done nothing towards making a claim until after the plaintiff had perfected his.

The defendant may possibly be entitled to the land upon which the toll-house and any other building which was erected *at the time of plaintiff's purchase stand, [*405] but he has not shown sufficient to enable him to retain more than that.

The judgment of the court below is reversed and a new trial ordered.

Statement of Facts.

PHILIP RICHARDSON, RESPONDENT, v. JONES &
DENTON, APPELLANTS.

[1 NEVADA, 405.]

¹JURORS, COMPETENCY OF.—The use of intoxicating liquor by a juror during the progress of a trial, or after the case has been submitted, unless furnished by the party in whose favor the verdict is given, or unless it is shown that intoxicating effects were produced, is no ground for setting aside the verdict or awarding a new trial.

²IDEM.—Every irregularity on the part of a jury does not authorize the verdict to be set aside unless the party complaining shows, by reasonable presumption, at least, that he has been injured thereby.

CONTRACTS, PENALTY FOR BREACH OF.—The violation of a contract in which a penalty for breach is inserted, does not necessarily authorize the recovery of such penalty.

IDEM.—WHEN ACTUAL DAMAGES MUST BE SHOWN.—In an action upon such an instrument, the plaintiff should not only prove the contract and the breach by defendant, but in addition thereto it is necessary to establish actual damages resulting from such breach, or he can only recover a mere nominal sum. In such case an allegation of actual damage, or the statement of facts from which it must be inferred, is indispensably necessary to the sufficiency of a complaint where more than mere nominal damages were claimed.

REASONABLE TIME.—Where no time is specified when an act is to be done, it will be presumed in law that it is to be done within a reasonable time.

APPEAL from the District Court of the Eighth Judicial District, State of Nevada, Douglas County, Hon. DANIEL VIRGIN presiding.

In the agreement upon which this action was brought, the plaintiff and the defendants bound themselves in the penal sum of ten thousand dollars for the performance of its stipulations and agreements.

The plaintiff alleges a breach of agreement on the part of the defendants, but does not allege that he suffers any actual damage thereby; but claims judgment for the penal sum of ten thousand dollars, fixed in the agreement as stipulated damages. Upon this count in the complaint the jury gave a verdict in favor of the plaintiff for the sum of six thousand five hundred dollars.

(1.) 6 Nev. 291; 7 Nev. 406; 7 Nev. 427.

(2.) 4 Nev. 266; 8 Nev. 30.

Opinion of the Court—Lewis, C. J.

Bryan & Seely, for Appellants.

**Cradlebaugh & Brumfield*, for Respondent. [*406]

By the Court, LEWIS, C. J.:

The verdict in this case being for the plaintiff, the defendants moved for a new trial, which was denied; defendants appeal, and claim that the judgment should be reversed.

First. Because of the misconduct of the jury; and,

Second. Because the plaintiff not having alleged or claimed damages in his complaint the verdict, which was for six thousand five hundred dollars, was not authorized by it.

Upon the motion for new trial the defendants produced the affidavit of N. C. Kinney, the deputy sheriff who was in charge of the jury after they had retired to deliberate on their verdict, *in which he swears that the [*407] jurors had in their possession and drank spirituous and intoxicating liquor, without the consent or authority of the court; that while he was absent from the jury room for a short time the jurors drank the larger portion of two bottles of the liquor; that he threw away the remainder, and received the assurance of the jurors that there was no more liquor in their possession; but that he again found them in possession of and drinking what he supposed to be either brandy or whisky.

It is not stated, however, by whom the liquor was furnished, or that so much was drank as to intoxicate or affect any of the jurors in the least. It has been held that a mere drinking of intoxicating liquor by a juror during the progress of a trial, regardless of the quantity or the fact that it was furnished by himself, would authorize the setting aside of the verdict. (*People v. Douglas*, 4 Cow. 26; *Brant v. Fowler*, 7 Cow. 562; *Rose v. Smith & Dary*, 4 Cow. 17; *Kellogg & Reed v. Wilds*, 15 Johns. 455, and *The People v. Ransome*, 7 Wend. 417.) But these decisions are not followed in the later cases. In *Wilson v. Abrahams* (1 Hill, 207), they were all reviewed, and the court held that the use of intoxicating liquor by jurors, unless furnished by the person in whose

Opinion of the Court—Lewis, C. J.

favor the verdict was given, or unless it were shown to have produced intoxicating effects, was no ground for setting aside the verdict.

Judge Bronson, in delivering the opinion of the court, concludes as follows:

“When in the course of the trial a juror has in any way come under the influence of the party who afterwards has the verdict, or there is reason to suspect that he has drank so much at his own expense as to unfit him for the proper discharge of his duty, or where he has so grossly misbehaved himself in any other respect as to show that he had no just sense of the responsibility of his station, the verdict ought not to stand. But every irregularity which would subject the juror to censure, whether in drinking spirituous liquors, separating from his fellows, or the like, should not overturn the verdict, unless there is some reason to suspect that irregularity may have had an influence on the final result.”

[*408] *This decision was followed by the same court in *Dunning v. Humphrey & Clark*, and they are sustained by numerous authorities both in this country and in England. *Com. v. Roby*, 12 Pick. 510; 6 Greenleaf, 379; *United States v. Gilbert*, 2 Sumner, 21; *Duke of Richmond v. Wise*, 1 Vent. 124; *The King v. Burdett*, 12 Mod. 111.)

Every irregularity on the part of a jury does not authorize the verdict to be set aside, unless the party complaining shows at least by reasonable presumption that he has been injured thereby.

In this case we see nothing from which it can be even inferred that the defendants were prejudiced by the misconduct complained of. If it were shown that any of the jurors drank so much liquor as to incapacitate them from the proper discharge of their duty, or so as to become in the least intoxicated, the verdict should be set aside. Nothing of the kind, however, appears.

The second point relied on by counsel for appellant seems to be well taken. The complaint seems to be framed solely with the view of recovering the penalty specified in the agreement between plaintiff and defendants, regardless of

Opinion of the Court—Lewis, C. J.

whether any actual damage had been suffered or not by the each of contract. The law, however, only authorizes the recovery of the actual damage sustained upon the breach of contract of this character; and if no actual damage is even none can be recovered, though a breach of contract shown.

The violation of an agreement in which a penalty for each is specified does not, therefore, necessarily authorize recovery of such penalty.

In an action upon such an instrument the plaintiff should not only prove the contract and the breach by defendants, but in addition thereto it is necessary to establish actual damages resulting from such breach, or he can only recover mere nominal sum. In such a case, if only nominal damages can be recovered where there is no actual damage sustained, it follows that an allegation of damage or the statement of facts from which it must be inferred becomes indispensably necessary to the sufficiency of a complaint where more than mere nominal damages are claimed.

*We find no such allegation in the complaint in [*409] this action. The statement that on the 10th day of August, A. D. 1864, plaintiff had sawed and delivered in the mill yard three hundred thousand feet of lumber more than the defendants had received or paid for, does not necessarily show a breach of contract, for the agreement provides only for the payment on the tenth day of each month for so much lumber as would appear by the shipping books of defendants to have been delivered to them.

And there is no provision in the instrument requiring the defendants to receive the lumber as fast as it was sawed. It is quite evident, however, that they were to pay for it only as it was received by them and evidenced by their shipping books.

If they refused for an unreasonable time to receive and pay for lumber sawed by plaintiff, there should be an allegation to that effect in the complaint, for where no time is specified when an act is to be done, it will be presumed in law that it is to be done within a reasonable time. In such a case plaintiff would be entitled to recover the same as if

Opinion of the Court—Lewis, C. J.

there had been a failure to perform an act which is expressly agreed to be performed on a day specified.

The complaint, therefore, does not state facts sufficient to sustain the judgment.

Judgment reversed, with leave granted plaintiff to amend his complaint.

RICHARD BROWN, RESPONDENT, v. E. S. DAVIS, APPELLANT.

[1 NEVADA, 409.]

COUNTY RECORDERS, EX OFFICIO AUDITORS.—The county recorders who, under section 32 of article IV. of the Constitution, become *ex officio* auditors, are those only who are elected under a legislative enactment passed after the adoption of the Constitution. The fact that a recorder is elected after the adoption of the Constitution, but not under a law passed after its adoption, will not entitle him to the position of auditor.

¹ STATUTES, HOW CONSTRUED.—The rule is cardinal and universal that if a law is plain and unambiguous, there is no room for construction, or interpretation.

² *IDEM*.—In the construction of a statute the intention of the legislature is the primary object to be ascertained, but to ascertain it recourse should first be had to the language employed, and if that be plain and unambiguous the courts must give it its strict and grammatical construction.

[*410] *APPEAL from the District Court of the Seventh Judicial District, State of Nevada, Lander County, Hon. W. H. Beatty presiding.

Ashley, and Garber & Hupp, for Appellant.

Labatt & Wren, for Respondent.

[*413] *By the Court, LEWIS, C. J.:

In the case of *Vesey v. Hermann*, this court held that the recorders who, under section 32 of article IV. of the Constitution, become *ex officio* county auditors, are those only who are elected under a legislative enactment passed after the adoption of the Constitution; that the Constitution

(1.) 5 Nev. 411; 6 Nev. 69; 6 Nev. 104; 8 Nev. 271; *Odd Fellows' S. & O. B. v. Quinn*, 11 Nev.

(2.) 1 Nev. 36; 4 Nev. 78; 10 Nev. 313.

Opinion of the Court—Lewis, C. J.

has reference only to recorders elected by virtue of *law passed after its adoption*. This is unquestionably correct and grammatical construction of the section in question. It declares that the legislature *shall* provide for the election of county recorders, who shall be *ex officio* auditors. Strictly, this language can have reference only to recorders elected under a law to be passed at some time in the future with respect to the adoption of the Constitution. It is claimed by counsel for appellants, however, that, as the plaintiff and defendant in this proceeding were elected to their respective positions after the adoption of the Constitution, this case does not come within the reasoning of the case of *Vesey v. Hermann*; that, upon the adoption of the Constitution, all the laws of the Territory of Nevada not repugnant to it, were also adopted as laws of the state, and that the election of the defendant to the office of recorder under the law so adopted, was in conformity with the spirit of the 32d section, and made him an *ex officio* auditor. If we depart from the strict literal construction of the section, we will find it difficult if not impossible to say what the intention of the framers of the Constitution was. The election of an individual under a law existing at the time the Constitution was framed, is clearly not within the literal meaning of the provision relating to recorders. The language employed in the Constitution is plain and explicit, and whatever may have been the intention of its framers, we cannot look beyond that language. The language is free from all ambiguity.

The rule is cardinal and universal that if the law is plain and unambiguous, there is no room for construction or interpretation."

The United States v. Fisher (2 Cranch, 358), the [*414] Court said: "Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they plainly expressed, and consequently, no room is left for construction."

In the same court said:

in construing these laws it has been truly stated to be

Opinion of the Court—Lewis, C. J.

the duty of the court to effect the intention of the legislature; but this intention is to be searched for in the words which the legislature has employed to convey it." In the case of *Nolley v. Buck* (8 Barn. and Cres. 160, 164), Lord Tenterden said: "The intention of this act certainly was to prevent voluntary preferences; the words may probably go beyond the intention; but if they do, it rests with the legislature to make an alteration—the duty of the court is only to construe and give effect to the provision." The same learned judge, in *Branding v. Barrington* (6 Id. 467, 475), used the following language: "Speaking for myself alone, I cannot forbear observing that I think there is always danger in giving effect to what is called the equity of a statute, and that it is much safer and better to rely on and abide by the plain words; although the legislature might possibly have provided for other cases had their attention been directed to them."

And Bagley, J., in delivering the opinion in the case of *The King v. The Inhabitants of Stoke Damerel* (7 Barn. and Cres. 563), said: "I do not know how to get rid of the words of this section of the act of parliament, and where the legislature, in a very modern act of parliament, have used words of a plain and definite import, it is very dangerous to put upon them a construction the effect of which will be to hold that the legislature did not mean that which they have expressed." So Tindell, C. J. (531), said: "It is the duty of all courts to confine themselves to the words of the legislature—nothing adding thereto, nothing diminishing." The intention of the legislature is the primary object to be ascertained in the construction of a statute; but how is that to be done? Recourse should first be had to the language employed, and if that be clear and explicit, and there be nothing *de hors* the statute which would occasion [*415] uncertainty, the courts must give that *language its strict and grammatical construction. (Sedgw. Stat. Law, 243.)

There is certainly no ambiguity in the language employed in the section of the Constitution under consideration, nor is there any circumstance that we are aware of from which

Points decided.

It can be inferred that the framers of that instrument did intend exactly what they have expressed in section 32. We abandon the strict letter, and endeavor to look for the reasons or the policy which induced its adoption, we become once involved in perplexing doubts and uncertainties; for the argument that it was the policy merely to allow all persons in office at the time of the adoption of the Constitution to continue so, and that as the plaintiff and defendant were elected afterwards, they do not come within the object of the act to be attained by the Constitution, may be answered by the fact that it was also the policy of the Convention to make the system of county and township governments uniform throughout the State, and that that system should be put into operation at the same time in all the counties of the State.

We, therefore, think it our duty to adhere to the strict grammatical construction which was adopted in the case *Vesey v. Hermann*.

Judgment affirmed.

EDWARD L. LEVEY, RESPONDENT, v. E. A. FARGO,
APPELLANT.

[1 NEVADA, 415.]

WRIT OF ATTACHMENT WITHOUT PROBABLE CAUSE.—In an action for damages for improperly suing out a writ of attachment, it is necessary to aver that the attachment was sued out "without probable cause." If such averment is omitted in the complaint, but words of similar import are employed in lieu thereof, a verdict will cure the defective complaint, even if it was such an one as should not have been sustained on demurrer.

DEMURRER—OBJECTIONS TO, AFTER ANSWER FILED.—Where a demurrer is interposed to such a complaint upon the general ground that it does not state facts sufficient to constitute a cause of action, goes on to point out the particulars in which the complaint is defective, but does not show the real defect, this court will not hold it was error to overrule the demurrer if the defendant chooses to answer instead of standing on his demurrer. This court will treat the case as if the party had answered without any demurrer.

WRIT OF ATTACHMENT—ACTION FOR MALICIOUS SUING OUT OF WRIT, WHAT MUST SHOW.—In an action for malicious suing out the writ of attachment, it is necessary to show not only a want of probable cause but also malice in suing out the writ. It is not sufficient to show malice in prosecuting the writ if there was none in suing it out.

Opinion of the Court—Beatty, J.

IDEM—ACTS OF AGENTS.—If the writ is sued out by an agent maliciously on his part, and without probable cause, he is liable and not the principal. If the principal maliciously continues the prosecution after he is informed of the fact that the writ was sued out without probable cause, he will be liable to a special action for the damages which accrue after this knowledge is obtained. But the complaint must state these facts correctly.

IDEM.—Proof that the attachment was sued out, not by the defendant but by his agent, would, *prima facie*, be a good defense, but that might be rebutted by proving that the agent acted under the express direction of his principal.

STATEMENTS ON MOTION FOR NEW TRIAL.—The method of making and settling statements on motion for new trial commented on.

APPEAL from the District Court of the Second Judicial District, State of Nevada, Ormsby County, Hon. S. H. WRIGHT presiding.

The facts of this case are fully stated in the opinion.

Clayton & Clarke, for Appellant.

[*417] **A. C. Ellis*, for Respondent.

By the Court, BEATTY, J.:

This was an action brought for a malicious issuing and prosecution of a writ of attachment.

The pleadings and evidence show that one Bedford and the plaintiff Levey were liquor merchants, and in the course of their trade became indebted in a considerable amount to the firm of C. Fargo & Co. of San Francisco.

C. Fargo & Co. assigned their claim against Bedford & Levey to the defendant in this action, E. A. Fargo. E. A. Fargo adjusted part of the claim with Bedford & Levey, and for the balance suit was brought; an affidavit for attachment was made by one Abe Newberger, acting as the agent of E. A. Fargo; the writ was issued and levied on the property of the plaintiff, he and Bedford having dissolved partnership before the issuance of the writ. Levey & Bedford did not defend the suit instituted against them by E. A. Fargo, but did put in a plea in the nature of a plea in abatement to the writ of attachment.

This plea was sustained, the attachment abated, and then the present action brought by Levy for injury to his goods, business, etc. Fargo demurred to the complaint; the demurrer was overruled; he then answered, and the case was tried before a jury, and judgment was rendered in favor of the plaintiff for seventeen hundred and twenty dollars. Defendant moved for a new trial, which motion was overruled, and an appeal from the order overruling that motion taken to this court.

The first point made by appellant is that the court erred in overruling the demurrer. It is contended that the complaint does not state facts sufficient to sustain the judgment, because it does not state that the writ was sued out *without probable cause*. Certainly this judgment can only be sustained on the theory that the writ was issued without probable cause. The complaint does not contain those exact words, but it does *contain this allegation [*418] on: "Yet the said defendant, out of his own malice and ill will, and without foundation in fact or law, and of wantonness, caused the *writ of attachment* to be issued from the district court of the second judicial district of the then territory of Nevada, in a case wherein this defendant was plaintiff, and this plaintiff and the said Bedford were defendants."

Whether this language sufficiently expresses a want of probable cause to sustain the complaint, if the point had been directly raised by a proper demurrer, it is perhaps not necessary in this place to decide. One of the definitions of wantonness given by Webster is "negligence of restraint." If the writ was issued in a spirit of recklessness or "negligence of restraint," it certainly implies that it was issued without probable cause. The language, although not such as should have been used in a pleading, is expressive of nearly the same idea.

Sec. 71 of our practice act provides that "the court shall at every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties; and no judgment shall be reversed or affected by reason of such error or defect."

Opinion of the Court—Beatty, J.

The common law also allowed many formal defects in pleading to be cured by verdict. The rule, as laid down in Chitty, page 673 of Chitty's Pleadings, is thus expressed:

"The general principle upon which it depends, appears to be that where there is any defect, imperfection or omission, in any pleading, whether in *substance* or *form*, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission is *cured by the verdict*."

Many examples are given in that work of defective pleadings being cured by verdict. Among others is one where suit was brought for malicious prosecution of a criminal action.

In such case, it is always necessary to aver in the [*419] *declaration that the criminal action or prosecution is at an end. Yet in that case the verdict was sustained, although there was no such averment in the complaint. Nor in that case were there any words of a similar import. The case cited by Chitty, page 679, to which we have referred, is a stronger case for sustaining a defective complaint than the one we are considering. We are not disposed to be more rigid than the courts of England in requiring nicety and precision in pleadings.

It may be contended that, although this is a case where the verdict would cure the defect in pleading if issue had been joined without the interposition of a demurrer, yet as a demurrer was interposed, it was error in the court to overrule the demurrer and force the defendant to take issue on a defective complaint.

If a complaint is clearly defective and a demurrer is overruled, the defendant may, at his option, refuse to answer; then the judgment goes by default, and there is no verdict to cure the defects, and the case must be reversed; but if the defendant in such case chooses to answer rather than stand on his demurrer, does he stand, after answer filed, in any better position than if he had answered in the first

Opinion of the Court—Beatty, J.

Whatever may be the general rule on this subject, I certainly think this defendant stands in no better position than if he had answered without demurrer. The grounds of demurrer as set out are as follows:

1. The complaint does not state facts sufficient to constitute a cause of action, in this: That this suit is brought in the name of the plaintiff alone, when the complaint shows

J. Bedford was a partner with plaintiff in the goods, and merchandise, and also in the business set out in defendant's complaint, and that no dissolution of copartnership between plaintiff and Bedford is shown to have taken place prior to the issuance and levy of the writ of attachment referred to in said complaint.

2. That there is a misjoinder of parties plaintiff, for the reasons above stated.

The demurrer does not point out the defect now complained of. Indeed, the defendant seems to purposely conceal his objection to another point, and he ought not to be allowed in relation to this point in a better position than if he had answered without the interposition of a demurrer. We hold, then, if there was a defect in the complaint which would have invalidated a judgment rendered on demurrer, it is cured by the verdict.

It is also contended by appellant that plaintiff was required to show both the want of probable cause and malice against the defendants to entitle him to a verdict. That in this case it was not sufficient to show malice in prosecuting the writ after it was sued out, but that it was issued by the wrongful procurement of the defendant.

Undoubtedly appellant is correct in both legal propositions.

If an agent maliciously, and without probable cause, procures an attachment without instructions from his principal, the agent, and not the principal, is responsible in damages. If the principal, after he finds out that his agent has maliciously and without probable cause, continues the procurement of the attachment, he will be responsible for the damages which arise after the facts of the case come to his knowledge. But there is no ground of action against the principal for the original suing out of the attachment.

Opinion of the Court—Beatty, J.

The complaint in such case, if against the principal, should aver the malicious prosecution of the writ after he discovered it had been issued without probable cause.

This complaint contains no such allegations. If, then, facts appear clearly from the statement, as claimed by appellant, that there was no proof introduced of want of probable cause, that there was no proof that defendant caused the writ of attachment to issue, and no proof of malice in the issuing or prosecuting the writ, certainly the judgment cannot be sustained.

This brings us to the examination of the statement as it appears in the transcript. Section 195 of the practice act provides in regard to statements as follows: "Such statements, when containing any portion of the evidence of the case, and not agreed to by the adverse party, shall be settled by the judge on notice."

The statement in this case is certainly not settled by the judge, and can hardly be said to be agreed to by [*421] the opposite *party. At least it is rather difficult to say what the adverse party did agree to. Appellant first made a statement. Then there is an order of court to this effect: "The plaintiff herein is allowed to file amended statement on new trial."

Then comes a statement by respondent (plaintiff) which commences in this way: "Now comes the plaintiff, by his attorney, in the above-entitled cause, and submits this, his amended statement of facts, proved at the trial of the cause, and asks that the same be made a part of the statement of facts on motion for a new trial herein." This amended statement is signed by plaintiff's (respondent's) counsel as the original statement was signed by appellant. Neither statement is signed by both counsel nor settled by the court; If there is a statement in the case, what is it? Does it consist of both statements combined, or are we only to look at the amended statement? The language used in the order of court would indicate that an amended statement was to be filed, which would be in itself, a complete statement, and supersede the original statement.

Where a party is dissatisfied with a statement on motion

new trial, made by his adversary, he has three methods of correcting it.

If the statement is wholly incorrect, he may make an *amended statement*, containing all the evidence touching those facts on which the moving party relies in his motion, and ask that it may be substituted for the original statement; secondly, he may make *amendments to the original statement* by moving to strike out some portions and add or substitute others; or thirdly, if the original statement is correct as far as it goes, but the adverse party thinks some additional evidence should be contained in the statement to fully present the case, he may make a supplemental statement containing that additional evidence, and ask that it may be attached to and made a part of the original statement. In either case, after the statement is properly amended, it should be either agreed to by both parties or ruled by the judge. In the case before us we hardly know whether to treat the amended statement as a substitute for the original, or as a supplemental statement of facts omitted from the original. The original statement uses the expression "it is in evidence," etc., going on to state [*422] facts which would be a complete defense to the action. The amended statement reads thus: "Plaintiff * * * submits this, his amended statement of facts proved at the trial. 1st. That," etc. Here follows a statement of facts in variance with those stated by appellant, and which, if true, would support the verdict and judgment. The original statement says certain facts were *in evidence*. The amended statement says that certain things "*were proved*." The two sets of facts are in many particulars contradictory and inconsistent. If we allow both statements to stand, we can only conclude that one or more witnesses were swearing to one state of facts, and one or more witnesses on the other side were swearing to another state of facts totally inconsistent with statements of the first witnesses. This being the case, we cannot disturb the action of the court now upon any point where there is an apparent conflict of testimony. Upon one material point alone there seems to have been no conflict of testimony. The original attach-

Opinion of the Court—Beatty, J.

ment was sued out not by the defendant here, but by his agent, Abo Newberger. This would seem to be a *prima facie* defense to this action. That defense might be rebutted by showing that although Abe Newberger made the affidavit for attachment, still he was instructed so to do by his principal, Fargo.

Appellant's statement shows that it *was in evidence*. Fargo never made an affidavit of attachment, that the affidavit was made by Newberger on the representations of Bedford; that Fargo had no knowledge of the making of affidavit or issuance of writ for several weeks after it took place, etc. On the other hand, respondent's statement shows it was *proved* that Fargo, shortly after the issuance of the attachment, in the month of July, informed Bedford by letter addressed to him at Austin, that he had commenced the suit by attachment, etc. The statement of this portion of the evidence is certainly not very satisfactory, still the proof on this point may have been sufficient to justify the jury in finding that the suit was commenced and the writ issued under the direction of Fargo. Indeed, as Fargo seems to have lived in Virginia, only sixteen miles distant, the reasonable presumption is that his agent would not have "proceeded without consulting with him," and slight circumstances might have justified the jury in believing he was consulted before suing out the writ.

It was doubtless either Newberger or defendant himself who proved Fargo had no knowledge of the writ's being sued out by his agent.

Bedford and Newberger were in conflict on other points of fact, and the jury seem to have believed Bedford and not Newberger. The jury believed his testimony in other matters, and believing it to disbelieve it in regard to Fargo's knowledge of the writ. While the court is by no means satisfied that there is sufficient evidence of Fargo's knowledge of the writ being sued out of the attachment, and the jury's finding on this point is contrary to the evidence, and against the weight of the presumptions and inferences, we are bound to follow the judgment of the jury. We are

Points decided.

atter satisfied with this result because the first instruction given by the court below clearly indicates the opinion of the judge that the jury could only find for the plaintiff on the theory that the attachment was sued out by the express authority and with the knowledge of the defendant. The court, entertaining that opinion of the law, must have granted a new trial if there was no testimony to show Fargo authorized or knew of the intended issuance of the attachment before it was done. We may observe here, too, that the judge's instructions in regard to malice and want of probable cause were based on sound law, and properly submitted the case to the jury on these points, so that although want of probable cause may not have been properly and technically charged, yet the point was fairly submitted to the jury.

The judgment of the court below must be affirmed.

A. N. SMITH ET AL., RESPONDENTS, v. NORTH AMERICAN MINING COMPANY, APPELLANT.

[1 NEVADA, 423.]

DEPOSITION—SUFFICIENCY OF COMMISSION.—A commission to take a deposition, authenticated by the certificate of the clerk, under the seal of the court and issued in pursuance of a former order of the court, is sufficient authority for taking the testimony of a witness.

EVIDENCE OF MINING CUSTOMS.—"Testimony as to mining customs may be introduced under our statute, however recent the date or short the duration of their establishment. [*425]

MINING CLAIMS—RIGHTS OF DISCOVERER.—If it be once established or admitted that one of a company of miners was the real discoverer and entitled to a discoverer's share in the location, then such discoverer could thereafter only be shown to have divested himself of that interest by clear and positive evidence. The evidence of one witness, that the party agreed the discoverer's claim should be divided among all the shareholders in the company, when contradicted by another witness who says he positively refused to assent to such a proposition, is not sufficient.

CORPORATION—ISSUANCE OF STOCK.—When a corporation has issued stock to the full number of shares which, by its charter or act of incorporation it is authorized to issue, no court can rightfully direct the issuance of other shares of stock, unless some of the shares issued were void.

REVERSAL—WHEN IMMATERIAL.—When a court errs in rejecting testimony, but

Opinion of the Court—Beatty, J.

after further proof and explanation admits the testimony, the former error becomes immaterial and is no ground for reversing the judgment.

CORPORATION, ISSUANCE OF STOCK—MISTAKES, HOW CORRECTED.—Where all the owners in a mining company transfer their entire interest to trustees to hold the mining ground in trust for the corporation, and to issue stock to the amount of a certain number of shares in lieu of the ground conveyed to them, and said trustees do issue the full number of shares of stock which they are authorized to issue, none of the stock issued is void, although one stockholder may receive more and another less than his just share. The mistake may be corrected by a court of equity by a proper decree, but not so as to make stock void in the hands of an innocent purchaser, nor by ordering the issuance of more stock than the company, by its organization, is entitled to issue.

APPEAL from the District Court of the First Judicial District, State of Nevada, Storey County, Hon. RICHARD RISING presiding.

The facts are stated in the opinion.

Hillyer & Whitman, for Appellant.

Taylor & Campbell, for Respondents.

By the Court, BEATTY, J.:

[*426] *The facts of this case are as follows: The plaintiffs, Smith and Gottschall, with eleven others, took up a mining claim in 1859. The notice of location contained thirteen names, but claimed fourteen shares of three hundred feet each. One extra share was claimed as a discoverer's right. Subsequently these locators and their successors in interest were incorporated under the name of the North American Mining Company. It was provided one share of stock should be issued for each foot of ground located; or, in other words, four thousand two hundred shares of stock were to be issued to the stockholders, each receiving in proportion to the ground he held. The mining ground was all conveyed to the corporation or its trustees, and stock issued to claimants. The plaintiffs claim they are entitled to a larger share of stock than they have received. They aver that Gottschall was the discoverer of the ledge, and in right of discovery was entitled to the extra share of three hundred feet. That Smith, by virtue of

an agreement between them, was interested to the extent of one-half in the same.

The answer denies that Gottschall was the discoverer or entitled to the three hundred feet by reason of being the discoverer, and avers that he and Smith had each received a full share of stock to which they were entitled. On a trial it was attempted to be shown by the defendant that Gottschall was not the discoverer, and if he was, that he waived his right as such in favor of the company, and that the discoverer's share was equally divided out among the thirteen locators.

*The court below find in effect that Gottschall [*427] was the first discoverer. That he had not waived his right, and was not estopped from asserting it. That the discovery claim had been improperly divided among the different stockholders, giving Smith and Gottschall each one-thirteenth, when they were each entitled to one-half of the discovery claim, and decreeing that the company should issue to them a sufficient number of shares to make, with what they had already received, the entire three hundred feet, less a few feet which had been used for the common benefit of the corporation. The defendant appeals from this judgment, and raises various points of error. That the commission under which a deposition was taken and read, was insufficient; that a motion for nonsuit was improperly overruled; that testimony as to a mining custom was improperly received; that the court erred in various rulings as to admission and exclusion of testimony, etc.; and finally, that the findings were against the weight of testimony.

The commission was issued in accordance with a previous order of the court. It was attested by the certificate of the clerk and under the seal of the court. We think it is in compliance with the statute.

The motion for nonsuit was properly overruled. The testimony as to a mining custom was properly admitted. Such customs under our statute may be proved, however recent the date or short the duration of their establishment. The common law doctrine as to customs does not govern in

Opinion of the Court—Beatty, J.

such cases. The rulings of the court as to the admission and rejection of testimony were, we think, right, with perhaps one exception, which we will hereafter notice.

As to the point made that the findings are against the weight of testimony, we can only say that the evidence that Gottschall was the discoverer of the mine is not as satisfactory as could be wished. We would suppose that clear and indisputable evidence might be brought as to a fact of this kind. Nevertheless there is sufficient evidence to justify the finding that he was the discoverer. If it once be admitted that he discovered the claim, and was by right of discovery entitled to the fourteenth share of three [*428] hundred feet, then he could *only lose that right by some clear and positive evidence of having divested himself thereof.

The only evidence offered to this effect is, that at a meeting of the proprietors about the time of the incorporation, the question was raised as to what was to be done with the discoverer's share. One witness says Gottschall agreed to let it be divided among the entire company; another says he objected to such division and claimed it for himself and Smith. There are some other slight circumstances tending to show he might have known that the company claimed this fourteenth share as the common property of the company. We think such evidence does not show that Gottschall ever divested himself of his claim to the three hundred feet, or that he is in any manner estopped from claiming them. We are satisfied with the finding of the court below.

During the progress of the trial the defendant offered to prove that the entire four thousand two hundred shares of stock had been issued, and consequently no new stock could be issued to plaintiffs without extending the limit of shares fixed by the constitution of the company. This evidence was rejected by the court. This ruling and the form of the decree present the real difficulties of the case. We are satisfied that when a corporation has issued certificates of stock (which are valid and not void) to the full extent of all the shares, which, by law and the constitution of the company, it may issue, no court can order the issu-

co of other shares, because in that respect the powers of the corporation have been exhausted. (See *Mechanics' Bank v. New York and New Haven R. R. Co.*, 3 Kernan, 9.)

The first question, then, to be determined is, were the certificates issued to the locators other than Smith and Gottschall for their supposed proportion of the discoverer's share absolutely void, or were they valid certificates issued to the wrong parties.

If void, then the ruling and decree are right, and the judgment must be affirmed. If, however, these certificates are not void, then the plaintiffs are entitled to a different remedy. They must be entitled to a pecuniary compensation from the company, or else to a remedy against the other locators who received more stock than they were entitled to.

*Again, what is the extent of the remedy to which [*429] they are entitled? If they receive stock from other locators, must they not refund any assessments paid by those to whom the stock was issued? If they receive pecuniary compensation from the corporation, are they to receive the full value of the stock, or its value less the amount of assessments paid or payable on the same? These are most important questions, not merely in this case, but to all mining corporations. Doubts must frequently arise as to how many shares particular individuals are entitled in mining corporations; mistakes must frequently be made in issuing shares. It is highly important to have some fixed rule as to how these mistakes are to be corrected. Who are to be made parties to a bill for that purpose? What is to be the nature of the relief afforded? Before determining this case we wish to hear argument on the points suggested. We are not only willing to hear argument from the counsel in this case, but also from the counsel of other mining companies who are interested in the question.

We shall order the case on the October calendar for further argument on the points suggested.

Opinion by Beatty, J., after re-argument.

Opinion, after re-argument, by BEATTY, J.:

When we wrote our former opinion in this case we left certain propositions undecided, and ordered the case on the calendar for argument upon the points suggested. By leave of the court the counsel for appellant filed a brief on one point not left open by the order of the court, resubmitting the case. That point was as to the alleged error of the court below in rejecting the company books when offered in evidence by the appellant. As we understand the record, it shows that when the books were first offered, the court ruled they were not admissible, on account of certain alterations and erasures contained in them. Afterwards, when those erasures were explained, the books were admitted. Even admitting the court erred in rejecting the books in the first place, the subsequent admission of them cured the error, and this was no ground for reversing the judgment. It was

for the reason that these books were subsequently [*430] *admitted that we failed to notice this point in our original decision.

This brings us back to the question propounded in our original opinion: "Were the certificates issued to the locators other than Smith and Gottschall for their supposed proportion of the discoverer's share absolutely void, or were they valid certificates issued to the wrong parties?"

The briefs which have been filed, however able and ingenious in argument, have failed to furnish any authorities bearing on this point.

After mature reflection we are inclined to think and so hold, that certificates issued under the circumstances of this case are not void, but valid certificates. That when certificates for four thousand two hundred shares of stock had been issued to those who signed the trust deed, the power of the trustees in this regard were exhausted.

That no more shares could be issued, and those issued should be held to represent the valid stock of the company, and should be good in the hands of any party receiving them by regular assignment and transfer on the books of the company. Here are, say, thirteen persons who unite in a deed of all their interests in a mining claim, which may

Opinion by Beatty, J., after re-argument.

be treated as a piece of real estate, embracing a certain number of feet or acres of land. The trustees are to hold this for corporate purposes, and issue stock or certificates of stock to each of the grantors in proportion to their respective interests in the real estate. It is the interest of all the members of the corporation that the certificates thus issued by the trustees of their own choice should be negotiable in the market. At least, if they do not acquire all the qualities of negotiable paper, that the public may rely with certainty on the proposition that certificates of stock issued by the trustees of a corporation to those who unite in the trust deed, and not exceeding in number of shares issued the limit fixed by the act of incorporation, should ever afterwards be held as valid evidence that the *bona fide* holders thereof are stockholders to the extent shown by the certificates. Any other rule would be highly prejudicial to the general interests of mining corporations.

The original stockholders in such associations almost *universally wish to sell portions of their stock [*431] to pay assessments and develop claims. If those who deal in stocks are required to go back of the action of the trustees in distributing their certificates of stock, and ascertain that they have made no mistake as to the number of shares issued to each stockholder, it would greatly interfere with the transfer of stocks and safety of those who deal in them. It would also operate very injuriously, as we have before stated, on the original shareholders, by making their certificates less negotiable. Indeed, we cannot see well how we could go behind the distribution of the trustees in regard to stock scattered among a number of the assignees of the original stockholders.

Suppose A, B and C form a corporation to contain three hundred shares, and convey their mining claim to a trustee or trustees, who are to hold the realty for corporation purposes, and issue certificates of stock to those who sign the trust deed. The trustee issues to A ten certificates of stock for ten shares each; they are issued at the same time, but numbered one to ten. A goes into the market and sells these different certificates; the first certificate he sells is No. 10; the last, perhaps, is No. 1.

Opinion by Beatty, J., after re-argument.

After he has sold all his stock it is discovered that he was entitled to only ninety shares of stock, while he got certificates for one hundred; on the other hand, C was entitled to one hundred and ten, and only got one hundred. Will the court direct one of A's certificates to be canceled, and one of the same kind issued to C? If so, which one will be canceled? All are in the hands of innocent purchasers. If it is proposed to cancel No. 10, as the last one issued, and the one which was in excess of A's just proportion, the holder might well say, although highest in number it was issued simultaneously with all his other certificates, and as A was undoubtedly entitled to ninety shares when he sold ten to me, my certificate should be held good.

If you propose to cancel certificate No. 1, the holder might well say, when this was issued, A was entitled to ninety shares. This was probably the very first certificate issued. Its number indicates that it was first signed and made out, though delivered simultaneously with nine [432] other certificates. It being the first certificate in order, and knowing that A was entitled to some stock, I had a right to buy it, without inquiring what other stock A may have sold.

To determine in such cases which stock should be canceled in the hands of an innocent holder would sometimes be impossible. The safest and most convenient rule, we think, is not to go behind the distribution made by the trustees when the stock has passed into the hands of innocent holders.

In other words, we hold that all stock issued by trustees, under the circumstances of this case, must be held as valid stock. If the full number of shares was issued before the filing of their bill, the court cannot order the issuance of additional stock, and, therefore, erred in refusing to permit appellant to prove all the stock of the company was issued and in the hands of the stockholders. For this reason the case must be reversed and a new trial granted.

The court below will allow either party desiring it to amend their pleadings, and bring other parties before the court. With proper parties before the court it would

Points decided.

be competent for that tribunal to order those who obtained more shares than they were entitled to (to hold them) to assign the surplus shares to the plaintiffs paying the amount of any assessment and legal interest, which the holders have paid.

Second, if the holders of those shares have received the excess, they must account for them. Where the parties received the excess of shares are no longer stockholders to a sufficient extent to replace the stock improperly taken, the company must make good to plaintiffs the stock not replaced or purchase other stock to replace it.

The criterion of damages will be the value of the stock when the decree is made. The plaintiffs will also be entitled to any dividends made on this stock, and will be liable with any assessments paid. This is a misstatement of the law.

Third, the trustees who were the mutual agents of all parties, for this reason the criterion of damages is different from the case where a party is deprived of his stock by a wrongful act.

Fourth, the company is compelled to pay for any portion of the stock, it will be entitled to indemnity [*433] for the parties who received and sold the excess.

The parties will probably be before the court on the trial of this case, who may wish to introduce other evidence about the discovery of the claim, the court will try the whole case *de novo*.

HOOPES, RESPONDENT, v. NATHAN MEYER,
APPELLANT.

[1 NEVADA, 433.]

ON MOTION FOR NEW TRIAL.—The statute requiring statements on a motion for new trial to contain the grounds of such motion is merely directory. A statement not made strictly in compliance with the spirit of the statute as to the grounds of motion, will still entitle the moving party to a new trial.

PRISONER AND DETAINER—JURISDICTION OF DISTRICT COURT.—The

. Disapproved in 5 Nev. 201. See also, 5 Nev. 258; 6 Nev. 261; 9 Nev. 142.

Points decided.

Constitution confers jurisdiction on the district courts to hear and determine actions of forcible entry and detainer without any special legislative enactment on the subject.

IDEM—FORFEITURE.—The forcible entry act, so far as the same defines forfeitures, etc., is in force. That part of it which directs what court shall assume jurisdiction is suspended and altered by the Constitution.

REPEAL OF LAW—EFFECT OF.—The repeal of the act takes away the right to impose a fine for its violation, but does not deprive parties of their rights acquired by contract under the law whilst it was in existence.

DEMAND FOR RENT—HOW MADE.—Our statute does not require a demand for rent to be made on the premises at a late hour of the day the same fall due in order to produce a forfeiture of the premises rented. The only demand required is the written demand for the money, which must be made after the rent has been three days due.

PLEADINGS—CONCLUSIONS OF LAW.—If the material facts stated in the complaint are denied in the answer, or if other facts are stated in avoidance it is not necessary to deny mere conclusions of law.

TENANT IN COMMON—TITLE OF.—The instruction that "the title of a tenant in common is not paramount to that of his co-tenant," was calculated to mislead and was therefore erroneous.

IDEM—WHEN EXCUSED FROM PAYING RENT.—The expression that a tenant can only excuse himself from paying rent when evicted by paramount title, means that he can only excuse himself when he is kept out of possession by one who has a legal right to do so, and not a mere trespasser against whom he has his remedy.

IDEM—WHEN LESSEE HAS NO REMEDY AGAINST.—If a party hold a lease from one of two tenants in common for certain premises, and the other [434] tenant in common afterwards takes possession of a part of the common property, the lessee has no remedy against him as he will be entitled to an abatement *pro tanto* in his rent.

IDEM—WHEN EVICTION BY, MAY BE SHOWN.—Evidence tending to show that defendant was kept out of possession of part of the leased premises by a tenant in common of the lessor or his agent should have been admitted.

RENT—WHEN AGREEMENT TO REDUCE, VOID.—When rent is fixed at a certain rate for a definite period, an agreement without consideration to reduce the rent during that period is void.

FORCIBLE ENTRY AND UNLAWFUL DETAINER—TREBLE DAMAGES.—The question of damages in actions of forcible entry and unlawful detainer discussed: *Held*, that there can be no treble damages.

APPEAL from the District Court of the First Judicial District, State of Nevada, Ormsby County, Hon. RICHARD RISING presiding.

The facts of this case are stated in the opinion of the court.

Williams & Bixler, for Appellant.

Opinion of the Court—Beatty, J.

vs. Campbell, for Respondent.

The Court, BEATTY, J.:

[*457]

was an action brought under the forcible entry and detainer act, for an unlawful holding over of a tenant. The plaintiff substantially alleges that plaintiff leased certain premises to defendant for the period of one year, from the 1st of April, 1864, to the 7th of April, 1865, for the sum of two thousand eight hundred dollars, which rent was to be paid in installments of four hundred dollars each month in advance. That the monthly rents falling due on the 1st of September, 7th of October, and 7th of November, respectively, were not paid, and that a demand was made on each of these days for the respective sums falling due on those days. That on the 18th day of October, 1864, a writ was served on defendant, requiring him to deliver up possession of the premises described or pay the rent then due. That this complaint was not complied with, and defendant still retains possession. That the rental value of the premises is four hundred dollars per month, and the plaintiff retains the same to the damage of plaintiff in the twelve hundred dollars.

Answer admits the execution and acceptance of the lease; *denies an *indebtedness* to the plaintiff of [*438] two thousand eight hundred dollars, or of four hundred dollars per month for rent. Denies that a demand was made for the 7th of September, October or November, as stated in the complaint. Avers that one Walter was a partner in common with plaintiff of the premises leased, and adds a non-joinder of parties in not making Walter a party to the complaint. Avers that, on the 7th day of July, 1864, an oral agreement was made with plaintiff that the rent should be reduced from four hundred dollars to two hundred dollars per month, and the July and August rents paid at that rate. Answer further avers that in August 1864, Max Walter evicted defendant from a portion of the leased premises. That Walter was tenant in common with plaintiff of the premises, and avers on oath of information and belief that said eviction was made

Opinion of the Court—Beatty, J.

with the connivance of plaintiff, and avers that the part from which he was evicted was worth two hundred dollars per month. There were some additional averments in the answer that cut no figure in the case. The case was tried before a jury, and the jury found for the plaintiff, assessing his damages at seven hundred and fifty dollars. The court, on motion of plaintiff, set aside so much of the finding as assessed the damages at seven hundred and fifty dollars, and assessed the same at twelve hundred dollars, on the ground that the amount of damages was not denied by defendant. The court then ordered judgment for restitution and treble damages, to wit, three thousand six hundred dollars. After judgment, defendant made a statement on motion for new trial. The court made an order granting the new trial unless plaintiff would remit twenty-four hundred dollars of the damages. This the plaintiff did, and the new trial was then refused. The case comes to us on appeal from the judgment and from the order refusing a new trial. There is in the transcript what purports to be a statement on motion for new trial, but none on appeal. Appellant makes a great many points which we shall have occasion hereafter to notice.

Respondent objects that this court cannot look into any of the alleged errors that do not appear on the judgment roll. That which purports to be a statement on [*439] motion for new trial *is not a statement, and should not be treated as such by this court, because it does not comply with the requirements of section 195 of the practice act. That section provides that when a new trial is moved for, it shall be on affidavits or "a statement of the grounds upon which he (the moving party) intends to rely."

This statement contains the evidence, instructions, a statement of the rulings of the court on several points, etc. but does not state or in any manner designate the points on which the defendant will rely on his motion for a new trial. If we turn back to the notice of intention to move for new trial, we find that notice informs plaintiff that defendant will move for a new trial upon the following grounds: "I

Opinion of the Court—Beatty, J.

iciency of the evidence to justify the *evidence* [verdict] judgment, and that it is against law. Errors of law arising at the trial, and excepted to by the defendant." If we consider the preliminary notice as a part of the movement on motion for new trial, it does contain a full statement of the grounds relied on. But even then the statement is too general to be of any value. It is not a statement as was contemplated by the statute. Undoubtedly it was the intention of the statute to require a statement to be made showing the error complained of with such precision as to enable the parties litigant to prepare a statement which should contain so much of the evidence and history of the trial as would be necessary to explain the contested points and no more. Such is undoubtedly proper practice, but one seldom followed by the profession. In nine cases out of ten when there is a statement on the record, it comes here incumbered with a mass of evidence having no relevancy to the errors assigned. Such statements increase the labor of counsel, the expenses of litigants, and are a source of vexation and annoyance to the court. We would gladly correct this loose and irregular practice. But as the statute does not expressly attach any penalty to parties failing to make proper statements, we think the ends of justice better attained by treating this statute as merely directory, and tolerating, whilst we disapprove such loose and irregular statements.

This was the practice pursued in California for some eight or ten years under an act similar to [*440] ours. The court finally adopted the rule there of not examining such statements rather as a matter of necessity than of choice. The press of business in that court prevented them from having time to examine such irregular statements. Under this pressing necessity they were compelled to adopt very stringent rules for enforcing this direction of the practice act. The legislature subsequently amended the practice act, so as to aid the court in carrying out its rulings on this subject. We shall not for the present refuse to examine records for such irregularity in the statement on motion for new trial or appeal, but may deem

Opinion of the Court—Beatty, J.

it incumbent on us to make some rule which will enforce a more strict compliance with the statute. The first error assigned by the appellant is in these words: "The district court, in the absence of any statute applying to and governing this class of cases in respect to that court, could not entertain jurisdiction of the action."

The Constitution itself confers jurisdiction on the district courts in this class of cases. Immediately after the Constitution went into effect, the district courts, by virtue of that instrument, had jurisdiction of all cases of this class. (See Section 6 of Article VI.) No legislation was necessary to give jurisdiction. The practice act of the former territory, which remains in force, provides the general method of proceeding in the district court. But it is urged that the action of "forcible entry and unlawful detainer" is not known to the common law, and therefore the district court cannot proceed in the trial of such a cause without some statute defining the action, stating the facts which must be proved and the judgment to be rendered, etc., on the proof of these facts. That we have no such law because our statute only authorizes justices of the peace, when such and such facts exist, to render certain judgments.

A part of this proposition is undoubtedly correct. Although the jurisdiction of the district courts is established by the Constitution over cases of forcible entry and detainer, yet if the common law does not show what is the character of such an action, and we had no statute in force when this suit was brought defining the nature of [*441] the action, of course the court *could not exercise its jurisdiction. The court could not make a law to govern the action of forcible entry and detainer, it could only declare and enforce an existing law. We think, however, the latter part of the proposition is untenable. Our act first prohibits forcible and unlawful entries. Then, in a separate section it authorizes justices of the peace to inquire into such violations of law, and directs the mode of proceeding in such inquiry. The prohibition of these acts is independent of the clause conferring jurisdiction, and directing how it shall be exercised.

Section 647 of the act shows what facts shall be proved to constitute the offense, and what shall be a good defense to the action; This section is by its terms certainly applicable to any court which might have jurisdiction of the case. These sections, then, defining the offense and the evidence are certainly not incompatible with the Constitution, are now in force, and with the aid of the general practice act would perhaps be all that would be necessary to enable the court to exercise its jurisdiction in cases of "forcible entry."

Section 648 directs what judgment a justice may enter after hearing the evidence or receiving the verdict of a jury. Although the language of this section is such as to confine it, when taken literally, to justices, we think, taking the statute and Constitution together, the two may be fairly interpreted so as to authorize the particular class of judgments described in section 648, to be rendered by any court having jurisdiction of the case.

Section 651 defines unlawful detainers of the kind complained of in this action, points out the method of proceeding in such cases, shows what facts shall be proved to sustain the action, etc. The section then provides that upon complaint to a justice, the justice shall proceed to hear, try, etc. This section, like section 648, is, when construed literally, inapplicable to the state of things existing when the new Constitution went into effect. But, to carry out the intent of that Constitution, we must substitute "courts having jurisdiction" for justices. We think so much of the law as defines the forfeiture, etc., is in force. That part of it which directs what court shall assume jurisdiction is suspended and altered by the Constitution.

*The second error assigned is in these words: "If [*442] the district court had power originally to entertain the case, it lost that power by the repeal of the act of 1861, concerning forcible entries and unlawful detainers."

It is claimed that the repeal of the former act *ipso facto* abrogates all proceedings being had thereunder, and deprives plaintiff of all right to recover in this proceeding.

He cannot recover, it is contended, under the old law, because it is repealed; nor under the new, because it is prospective in its operation.

Opinion of the Court—Beatty, J.

The repeal of a criminal or penal law certainly arrests all proceedings thereunder. So far as this law partakes of a criminal character, no doubt its operation is suspended and annulled by the repeal. No fine could be imposed by a court in a case which was commenced under the old law and tried after its repeal. But in regard to the civil rights acquired under the provisions of the former law, we apprehend a different rule prevails. The repeal of a law, it is said, obliterates it from the statute book, as if it had never been there; but there are some, we might say many, exceptions to this general sweeping effect ascribed to the repeal of the statute. We need only notice one exception. If a right has been acquired by contract under the provisions of a statute, a repeal of that statute will not divest the right. Indeed, it could not have such an effect without a violation of the Constitution of the United States. (See Sedgw. Stat. Law, 133, and cases there cited.) This case comes within that very exception. Here, by the terms of the lease, and in virtue of the law existing when it was executed, the lessor is entitled to have that lease abrogated and set aside, and be restored to the use of his property on the failure of his tenant to pay rent. Appellant contends that the right to be restored to his property is taken away by a repeal of the act under discussion.

The repeal of a statute has never been held to produce such an effect, even in England. Under the restrictions of our National Constitution, it could not produce such an effect. Appellant's point is untenable.

The next point relied on is, that the court erred in [*443] refusing * to grant a nonsuit on motion of defendant.

The defendant claimed that he was entitled to a nonsuit because there was no proof of demand made for rent, either on the 7th of September or October. The respondent claims there was no necessity for proof, because there was no sufficient denial of the allegations of the complaint. The court is so unfortunate as to differ with both counsel on this point. We think the denial in the answer is sufficient to raise an issue of fact. The demand is simply alleged to have been made on a certain day. The denial is "that th

mand was not made on that day, as alleged." It is argued that the words "*as alleged*" qualify the answer, so as to make it a negative pregnant.

Had the allegation of the complaint been that the demand was made in some particular manner, as that it was made on the premises at a late hour of the day, etc., then the words, "*as alleged*," might be considered as referring to the manner and not the fact of a demand. But as there are no qualifying circumstances accompanying the demand as averred, we think the words, "*as alleged*," should be treated as mere surplusage, and the denial as good.

But whilst we hold the denial sufficient, we are of the opinion that the allegation was unnecessary, and need not be proved. Under the rulings of the California courts on a similar statute, it has been held that demand for rent must be made not only on the day that the rent falls due, but at a late hour of the day.

If part of this rule is good, doubtless all of it is; and plaintiff must have failed for not proving or alleging the hour at which the demand was made. But we hold that the statute does not require any demand to be made but one—that is, the written demand, to be made after rent has been three days past due. That was clearly averred in the complaint, and not denied. We think the ruling of the California courts in regard to the necessity of making a formal demand for rent at a certain hour of the day it becomes due, is in violation of the letter of the statute, tends to produce confusion, delay, an increase of litigation, and to defeat the very objects of the statute, which appear to be laudable and just.

The courts of California have intimated that they were not *satisfied with their earlier interpretation [*444] of this statute, and the legislature of that State has so amended their statute as to make it mean beyond mistake what we think it meant when it was first passed. The second instruction, given at request of plaintiff, is technically wrong, because it instructs the jury that the failure to answer certain averments, among others, that plaintiffs were entitled to the possession of the premises sued for, etc.,

Opinion of the Court—Beatty, J.

are conclusive against defendant. The answer must deny all *material facts* stated in the complaint. It is not necessary to deny mere conclusions of law. It is sometimes difficult to say whether an allegation in a complaint is a mere averment as to a conclusion of law, or whether it also contains some averment of a material fact. (It is, therefore, not improper in a pleader, out of abundance of caution, to deny all the material allegations in a complaint which are untrue, although some of them may be rather conclusions of law than facts from which such conclusions of law are to be drawn.)

But when the pleadings contain a fair issue as to facts, the mere failure to deny legal conclusions should not prejudice the defendant. In this case certain facts are stated by plaintiff, and from the existence of those facts he avers, as his conclusions of law, that he is entitled to the possession of the premises sued for. The defendant answers and does not deny any material allegation of the complaint, but does set out some matters in avoidance. These matters defendant was entitled to prove, and if proved, they were a defense *pro tanto*.

That portion of the fourth instruction, given at request of plaintiff, which is in these words: "The title of a tenant in common is not paramount to that of his co-tenant," was calculated to mislead the jury, and was erroneous.

That sentence contains a proposition *literally* true but wholly inapplicable to this case. The text books lay down the general proposition that a tenant can only plead an eviction by *paramount* title as an excuse for the non-payment of rent. The words "*paramount title*," are used in such cases in a general and not technical sense, to distinguish an eviction by one having lawful authority to hold as against the tenant from an eviction by a mere trespasser.

If a tenant is evicted by a trespasser, the law affords [*445] him the means of being reinstated. *It is his duty to resort to that remedy. He cannot refuse to pay his rent because of a wrong done to him or his possession by a stranger. But if he is evicted by one who has the right of possession, one against whom the defendant could

Opinion of the Court—Beatty, J.

It maintain an action to recover back the possession, then he is excused from paying his rent. Here, according to the verments of the answer, the tenant was in possession of the whole premises by virtue of a lease from one tenant in common. The other tenant in common takes possession of a portion of the common property. If there was no force or fraud used by the tenant in common in getting possession of his portion, we do not see how the tenant could recover of him. If the tenant could not recover, certainly he is not bound to pay rent for the premises of which he does not hold possession.

There was no error in refusing instructions No. 1 and 2 asked by defendant. The answer admits the amount of rent agreed to be paid. Plaintiff was entitled to recover to that extent without proof, provided defendant showed nothing to the contrary. As to the point embraced in second instruction, we have already held that no demand for rent was necessary.

The court below also erred in ruling out the evidence concerning eviction by Max Walter. It is not very clear from the statement that at the time of the eviction, Max Walter was a tenant in common with the plaintiff. It is at least probable he had sold his interest to Thomas Walter. The statement does not, however, show this positively. There is some evidence in the statement as it comes to us that Max Walter was still a tenant in common in the property. If there was any testimony showing that he was a tenant in common, or that he was acting as the agent of Thomas Walter, a tenant in common, the evidence should have gone to the jury.

The allegations of the answer as to an agreement for the reduction of rent do not amount to a defense. There does not appear to be any consideration for the agreement. Doubtless where there is an agreement under seal, that agreement may be superseded by a new agreement not under seal after the latter agreement has been executed in whole or in part. But it must be a new agreement based on some good and valid consideration. Here there is an agreement under seal to pay *four thou- [*446]

Opinion of the Court—Beatty, J.

sand eight hundred dollars for one year's rent of certain premises, payable in twelve monthly installments of four hundred dollars each. It is alleged there was subsequently an agreement on the part of the landlord to accept two hundred dollars per month in lieu of the four hundred dollars. There is no allegation of any consideration for this agreement. It is not shown that defendant bound himself to surrender his lease at the end of a shorter term, or to pay rent for a longer term, or to perform or refrain from doing any act in consideration of the change. It amounts simply to a promise on the part of the plaintiff that he will accept two hundred dollars instead of four hundred dollars—a promise made without consideration and void.

It results from the views expressed in the foregoing opinion, that on the pleadings alone, without proof, plaintiff is entitled to recover so much of the premises sued for as are in possession of the defendant. What amount of damages plaintiff is entitled to recover is a question of more difficulty. The question is, shall a plaintiff, in a case of this kind, recover treble or single damages? Section 648 of the practice act provides, that in cases of this kind, where the defendant was found guilty, the justice shall render judgment of restitution in favor of plaintiff; shall impose a fine on defendant; shall tax costs for plaintiff, and issue execution and writ of restitution.

Section 650 provides that the justice shall render judgment for the plaintiff for treble the damages assessed by the jury. The authority for rendering the different parts of the judgment are thus separated into two sections, with one section intervening. Section 651 provides for cases where a tenant holds over, and the proper steps have been taken to terminate the lease, and concludes thus:

“The justice shall proceed to hear, try and determine the same, in the same manner as in other cases hereinbefore provided for, but shall impose no fine upon any such case mentioned in this section.”

The question is, whether the words “proceed to hear, try, and determine the same,” has reference to the manner

Opinion of the Court—Beatty, J.

eding, trying, etc., as provided in 648 only, or in 650. Judging from the language used, it seem that *these words must refer to both [*447] eding sections. In fact, without it does so, ould seem to be no authority given to justices for any money judgment in cases of this kind, except s. The words of exception, "but shall impose no a any such case," seem to indicate that there should her difference in other respects between a judgment ble entry and unlawful holding over. These seemed first view, almost irresistible reasons for coming to clusion that the plaintiff, in such cases, was entitled to treble damages; but if the plaintiff is entitled to amages, for what space of time are those damages ebled? Suppose A., on the 1st day of January, house to B. for twelve months, at one hundred dollar month, the rent to be paid monthly in advance. month's rent is paid, then for six months nothing the landlord being satisfied as to the tenant's solnd taking no steps to create a forfeiture. On the of August the landlord demands the rent that day is not paid, and on the 4th he makes the written for the surrender of the premises or the payment nt due. On the 8th day of August suit is brought. amages are to be trebled? It has been held in Calinder a statute from which ours was copied, that ich fell due for a period of time antecedent to that e rent was demanded could not be recovered in this That prior to the demand for rent, the tenant was gfully in possession, and therefore the rents could recovered as damages in an action for wrongful over, but only in an action upon contracts, such as venant, assumpsit, or some similar action, (*Howard line*, 20 Cal. 282.) Then, in the case put, if this y be right, no rents prior to August could be re- . What rents could be recovered and trebled after ' The demand of rent is made the first of August. econd and written demand for rent or possession is e 4th. At the close of the 7th the forfeiture be-

Opinion of the Court—Beatty, J.

comes complete, and relates back to the 1st. The suit is brought on the 8th. Is the plaintiff entitled to recover three hundred dollars, which would be treble the rent agreed to be paid in advance for the month of August, or treble the value of the property for the first seven [*448] *days of August, during which he has wrongfully held over. We cannot answer this question from the reading of the statute. But we have held that a special demand of the rent at the very time it falls due is not necessary.

Can it be held that in the case put, if, after the payment of rent in January, the landlord should fail to demand any rent until the 4th of December, he could then demand an immediate surrender of the premises, or the payment of eleven months' rent? and in case the tenant was unable for three days to comply with this demand, to treat the tenant as a trespasser since February and recover treble rents for eleven months? It can hardly be supposed the legislature intended anything of the kind. Many other cases might be put, presenting equal difficulties as to the application of this law to cases that might arise. Whilst, then, we think the legislature has used language which would seem to indicate that in some way treble damages were to be recovered from tenants holding over, the statute has utterly failed to show what damages should be trebled. Under, then, the well known principle that penalties and forfeitures will not be extended by implication and doubtful construction, we feel justified in holding that this section does not authorize treble damages in any specific class of cases, and no such judgment can be rendered against a tenant holding over. If there can be no treble damages, this case is relieved of many of its difficulties. The pleadings show, either by direct admissions or failure to deny allegations of complaint, that the premises were rented for four hundred dollars per month; that no rent for the months of September, October and November was paid or tendered; that proper demand was made, and the premises were not delivered to the landlord. These facts make a *prima facie* case, entitling plaintiff to judgment for restitution and twelve hundred

Points decided.

llars damages; but there is an allegation by defendant at during all the period of these three months he was prived of the possession of a part of the premises leased, ich part was of the monthly value of two hundred dollars, and that this eviction was by a tenant in common of a landlord. If this defense can be sustained by the defendant, he will be entitled to a credit or deduction

six hundred dollars *from the twelve hundred [*449] dollars, for which judgment was rendered.

Defendant was deprived of the opportunity of making his defense, and therefore is entitled to a new trial, unless the plaintiff should be willing to remit or release six hundred dollars of the damages recovered. If the plaintiff will remit the damages to that extent, the judgment will be affirmed, otherwise the order of the court below refusing a new trial must be reversed and the case remanded.

If within ten days after the publication of this opinion the plaintiff in the court below will file with the clerk for the use of the defendant, a release from six hundred dollars of the damages recovered, and also a consent that appellant's costs in this court shall be credited on the judgment in favor of respondent, and have the same certified to this court, then the judgment of the court below will be in all things affirmed. Otherwise the clerk of this court, at the expiration of said ten days, will enter an order reversing the order of the court below, refusing a new trial, and remanding this cause for further proceedings.

EX PARTE WM. SALGE, UPON APPLICATION TO BE
DISCHARGED ON WRIT OF HABEAS CORPUS.

[1 NEVADA, 440.]

SECTION TEN OF HABEAS CORPUS ACT CONSTRUED.—*Held*, that under this act, the return should fully state why the prisoner is detained, and if there is any written authority for the detention, a copy thereof should be set forth in the officer's return, in addition to the general statement of the cause of the detention.

JUDGMENT IN A CRIMINAL CASE—WHEN VALID.—A judgment in a criminal case, showing the parties thereto, the court in which it was rendered,

Opinion of the Court—Beatty, J.

directing the term of imprisonment, the prison in which defendant is to be confined, and reciting the offense for which the prisoner is to be punished is all the statute requires.

PRISONER—HOW HELD IN STATE PRISON.—The prisoner is held by virtue of the sentence of the court, and the warden needs no other warrant for holding him, except a copy of the judgment or sentence.

JUDGMENT OF THE COURT—WHAT CONSTITUTES.—If a judge, in passing sentence on a criminal, fails to recite all the facts that should be recited in the judgment, but the clerk enters up the judgment on the minutes of the court in due form and with the recitals required by law, that becomes the judgment of the court.

[*450] **Musser, Johnson & Wells, for Petitioner.*

Attorney-General Nourse, for the State.

THE facts of this case are stated in the opinion.

By the Court, BEATTY, J.:

This was an application heard at chambers before two of the judges of the supreme court, on the part of the petitioner to be released from confinement in the state prison, in which he alleges he is illegally detained. That he "has never been, by the sentence or judgment of any court of competent jurisdiction, in this state or elsewhere, adjudged or sentenced to imprisonment in said prison or otherwise for the commission of any crime."

[*451] *The warden of the state prison, in addition to setting out his official character and the fact that as warden of the prison he detains the prisoner, states these facts in his return: I further certify and return that said William Salge was, on the 20th day of July, 1865, placed in my charge and custody, as warden of the state prison of said state, by the sheriff of Douglas county, in said state, under a commitment of which a copy is hereto annexed, marked "Exhibit A," under and by virtue of which I have held and still hold said William Salge in custody as warden of the state prison of Nevada. I further certify and return that said William Salge was, prior to said 20th of July, 1865, duly indicted by the grand jury of Douglas county, state of Nevada, and tried before the district court of the eighth judicial district, Douglas county, aforesaid, for the

Opinion of the Court—Beatty, J.

crime of grand larceny, and duly convicted thereof; and as by said court sentenced upon said conviction to imprisonment, in the state prison of the state of Nevada, for the term of three years, and that said term of imprisonment commenced on said 20th day of July, 1865, and is not yet expired.

[EXHIBIT "A."]

EIGHTH JUDICIAL DISTRICT COURT,
DOUGLAS COUNTY, STATE OF NEVADA. }

State of Nevada v. William Salge.—Now at this time said defendant, William Salge, being in court and being ordered to stand up and receive his sentence, the court proceeded to pronounce the following sentence, viz.: "That you, William Salge, are hereby sentenced to imprisonment in the state prison of the state of Nevada during the term of three years, for the crime of grand larceny, and that the sheriff of said county be required to convey you there and deliver you into the hands of the warden of said prison."

STATE OF NEVADA, COUNTY OF DOUGLAS, } ss.
EIGHTH JUDICIAL DISTRICT.

I, Joel A. Harvey, clerk of the eighth judicial district court of Douglas county, state of Nevada, do hereby certify that the above and foregoing is a full, true and correct copy of the original minutes which now remain on file and of record *in my office at Genoa, in said [*452] county and state. In testimony whereof I have hereunto set my hand and affixed the seal of said court, this 20th day of July, A.D. 1865.

JOEL A. HARVEY, Clerk.

The prisoner denied that any valid judgment had been rendered sentencing him to imprisonment. A record which was brought up to the supreme court on appeal was, by consent of parties, introduced as evidence in this case. The points made by the counsel of petitioner are: First. That the warden having shown that the prisoner was in custody under what he styles a "commitment" in his return, could not go beyond that commitment and show that he held him in custody by virtue of a judgment of a court, unless that judgment was fully set out in the commitment.

Section 10 of the *habeas corpus* act, among other things,

Opinion of the Court—Beatty, J.

provides: "The party upon whom such writ shall be duly served shall state in his return, plainly and unequivocally: First. Whether he have or have not the party in custody or under his power or restraint. Second. If he have the party in his custody or power or under his restraint, he shall state the authority and cause of such imprisonment or restraint, setting forth the same at large. Third. If the party be detained by virtue of any writ, warrant or any other written authority, a copy thereof shall be annexed to the return, and the original shall be produced and exhibited to the judge on the hearing of such return."

The court understands these sections differently from counsel. We understand that the third division of this section is merely cumulative of the second. The return should fully state, as the second division requires, why the prisoner is detained, and if there be any written authority for the detention, a copy thereof should be set forth in the officer's return, *in addition* to the general statement of the cause of detention. Second. The counsel for prisoner contend that there is no valid judgment against the prisoner, shown either by the copy of the commitment returned by the warden, or by the record which was produced in evidence.

We differ from counsel on both propositions. The [*453] law provides: "When a judgment has been *pronounced, a certified copy of the entry thereof in the minutes shall be forthwith furnished to the officer whose duty it is to execute the judgment, and no other warrant or authority is necessary to justify or require the execution thereof, except when judgment of death is rendered."

This document, which is termed a commitment, and made a part of the warden's return, as shown above, contains a certified copy of what we conceive to be a valid judgment. Section four hundred and fifty of the criminal practice act is in these words: "When judgment upon a conviction is rendered, the clerk shall enter the same in the minutes, stating briefly the offense for which the conviction has been had, and shall, within five days, annex together and file the following papers, which shall constitute the record of the action: First. A copy of the minutes of any challenge which

Opinion of the Court—Beatty, J.

have been interposed by the defendant to the panel of grand jury, or to any individual grand juror, and the proceedings thereon. Second. The indictment and a copy of the minutes of the plea of, or demurrer. Third. A copy of the minutes of any challenge which may have been interposed of the panel of the trial jury, or to an individual juror, and the proceedings thereon. Fourth. A copy of the minutes of the trial. Fifth. A copy of the minutes of the judgment. Sixth. The bill of exceptions, if there be one. Seventh. The written charges asked of the court, if there be any."

It appears to us that the judgment quoted in exhibit "A" contains all the statute requires to be contained in a judgment, in a criminal case, the sentence defining the punishment, and a statement of the offense for which the punishment is inflicted. The prisoner is held by virtue of the sentence of the court, and the warden needs no other warrant for holding him, except a copy of the judgment or sentence.

But the counsel for prisoner contend not only that the sentence or judgment of the court is in itself insufficient to hold the prisoner, but that such as it is, it was never rendered by the court but only by the clerk; that the clerk should not render any sentence or judgment. To make out this point they produce the record which was made out on appeal. In that record, on page 17, is the following: Now at this time *said defendant, William Salge, [*454] being in court, and having been informed by the court of the nature of the indictment, and his plea, and the verdict of the jury, and being asked whether he had any legal cause to show why judgment should not be pronounced, and being ordered to stand up and receive his sentence, the court proceeded to pronounce the following sentence: That you, William Salge, are hereby sentenced to imprisonment in the state prison of the state of Nevada, during a term of three (3) years, for the crime of grand larceny, and that the *sheriff* of the county be required to convey you there and deliver you into the hands of the warden of the prison."

Opinion of the Court—Beatty, J.

This we take to be the judgment of the court properly entered of record. The objection made to this judgment is, that in the recitals which precede the judgment, whilst it appears the prisoner was asked, "Whether he had any legal cause to show why judgment should not be pronounced," the words "against him," which should have followed the word "pronounced," are omitted. This objection we think rather more technical than substantial. It is not to be presumed that when the prisoner was asked as to whether he could show any legal cause why sentence should not be pronounced, that he was in any doubt as to the person on whom the sentence was to be pronounced, or that he received any detriment from the omission of the words "against him." On page 21 of the transcript is the following certificate of the clerk of the court before which the prisoner was tried:

SENTENCE.

The following was the sentence as pronounced by the court:

The judgment of this court is, that you, William Salge, are ordered, adjudged, and decreed to imprisonment in the State prison of the State of Nevada, during the term of three years. And as the sentence appears in the minutes and the transcript, it was made and entered by the clerk of said court, without the order or direction of the court.

JOEL A. HARVEY,

Clerk of the Eighth District Court.

GENOA, September 6, 1865.

[*455] *It is contended this certificate shows that the judgment on page 17 of the transcript is not the judgment of the court, but is a judgment rendered by the clerk, and a different one from the judgment of the court. The certificate last quoted is no part of the record, and proves nothing.

It is not such a certificate as the clerk in his official capacity is authorized to give. It is no more than a written statement by a private individual, that the judgment entered in the records of the court is not the real judgment of the

Points decided.

urt. Such a certificate is a mere nullity. Suppose, however, in this case, that the certificate proves all counsel intend for, that the language used in that certificate was a language of the judge in passing sentence, what difference could it make? The judge, in passing sentence, or rendering judgment (for we conceive they both amount to the same thing), uses language neither expressing fully nor accurately his meaning, yet the clerk understands him, and in entering the judgment of record uses more full, accurate, and appropriate language. The record, after it is made up by the clerk, is approved and signed by the judge. Can any one doubt this is the judgment of the court? In both civil and criminal cases the judgment of the court is usually given orally and without much regard to form. The clerk then writes out the judgment in form (quite different, generally, from the language used by the court or judge), the court approves the judgment as written out, and thereby makes it the judgment of the court. Certainly there is nothing improper or irregular in such a course. The prisoner must be remanded to the custody of the warden of the state prison, to be by him detained until the expiration of his term of service, or until otherwise legally discharged.

BROSNAN, J., did not participate in this case.

THE STATE OF NEVADA, RESPONDENT, v. WILLIAM SALGE, APPELLANT.

[1 NEVADA, 455.]

QUALIFIED JUROR—REGISTRY LAW.—*By the provisions of the [*456] registry law, all persons had, until the last day in the first week in October, A.D. 1865, within which to have their names registered; no disqualification would result until after that time. An elector, otherwise qualified, would, therefore, be a competent juror until after the expiration of the first week in October, although he had not paid his poll-tax.

CITIZENSHIP—WHAT CONSTITUTES.—Held, error to disallow a challenge to a juror who, on his *voir dire*, stated "that he was born in the Province of Canada, and lived there until he was twenty-one years of age; that

(1.) 1 Nev. 548.

Opinion of the Court—Lewis, C. J.

he had been *told* that his father was a citizen of the United States prior to the time of removing to Canada; that he had no knowledge that his father became a citizen of Canada; and also that he did not know of which country his father claimed citizenship; that his residence and home was in Canada so long as he knew anything about it, and that he (the juror) had never been naturalized."

IDEM.—When all that is known of a person's citizenship is that his residence and home had been in a foreign country, the mere statement of a stranger that he was a citizen of the United States is not sufficient to establish his citizenship in this country against the presumption which would arise from his home being in another country.

BILL OF EXCEPTIONS--TIME FOR SIGNING DIRECTORY.—The time prescribed by the practice act within which a bill of exceptions in a criminal case is to be signed by the judge is merely directory.

APPEAL from the District Court of the Eighth Judicial District, State of Nevada, Douglas County, Hon. DANIEL VIRGIN presiding.

The facts in this case sufficiently appear in the opinion of the court.

J. J. Musser, J. Neely Johnson and Thos. Wells, for Appellant.

Geo. H. Nourse, Attorney-General, for Respondent.

[*457] *By the Court, LEWIS, C. J.:

The challenge to the juror Smart was properly disallowed by the court. That he had not paid his poll tax or had his name registered at the time of the trial of this cause can be no objection to him as a juror.

The Constitution of the state, section 1, article II., provides that every white male citizen of the United States, (not laboring under certain disabilities) of the age of twenty-one years and upwards, who shall have actually and *not* constructively resided in the State six months, and in the district or county thirty days, next preceding any election, shall be entitled to vote for all officers that now are or hereafter may be elected by the people, and upon all questions submitted to the electors at such election.

This section enumerates all the qualifications which [*458] were *required at the time the act requiring the

ymment of poll tax and registry of the names of electors came a law.

All persons who were qualified voters under the Constitution would certainly continue to be so until they became disqualified by a failure to comply with the requirements of the registry law.

It cannot be said that the juror had failed to comply with that law, for by its provisions he had until the last day of the first week in October within which to have his name registered.

The disqualification results only from the failure of the person to have his name appear on the register upon the day of the election. (Laws of 1864-5, 386, sec. 17.) Therefore, until the time expires within which by law he was required to have his name registered, it cannot be said that he had failed to comply with it.

This case was tried in July; the time had not expired within which the juror was required to register his name, and he was therefore qualified to sit as a juror. What might be the result if the case had been tried after the last day in the first week of October, and the juror had failed to comply with the law, is a question which does not arise in this case, and which we do not pass upon.

The court, however, erred in disallowing the challenge to the juror Gilbert Sackrider, who stated upon his *voir dire* that he was born in the province of Canada, and lived there until he was twenty-four years of age. He had been told that his father was a citizen of the United States prior to removing to Canada, which was before his (the juror's) birth, and that he never had any knowledge that his father became a citizen of Canada. He also stated that he did not know of which country his father claimed citizenship; that his residence and home was in Canada so long as he knew anything about it, and that he (the juror) had never been naturalized as a citizen of the United States. The counsel for defendant thereupon challenged the juror, stating as the ground for such challenge that he was not a citizen of the United States, and therefore incompetent to sit as a juror; the court disallowed the challenge, admitted the

Opinion of the Court—Lewis, C. J.

juror, and the defendant excepted. This ruling of the court among others is assigned as error.

[*459] *It is provided by act of Congress that persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose parents were, or shall be at the time of their birth, citizens of the United States, shall be deemed and considered citizens of the United States. (Dunlop's Dig. 1450.)

If it is shown that Sackrider comes within the provisions of this law, he was properly admitted as a juror; but looking at his statement in the most favorable light possible for the prosecution, it must be admitted that his citizenship is extremely doubtful. The only expression used by him which in any way favors the presumption that he is a citizen of the United States is, that he was told that his father was a citizen of the United States prior to his removal to Canada; but he afterwards says distinctly, that he does not know of which country his father claimed citizenship, and that he himself has not been naturalized as a citizen of the United States. Indeed, every fact which he states of his own knowledge favors the conclusion that he is not a citizen. So long as he can remember, his father's home and residence was in Canada. This would raise the presumption that he was a citizen of that country; and there is nothing to overcome that presumption but the statement of some one that he was a citizen of the United States, which does not seem to have been sufficient even to satisfy the juror himself that such was the fact, for he says positively, that he does not know of which country his father claimed citizenship.

When all that is known of a person is that his home and residence has been in a foreign country, the mere statement of a stranger that he was a citizen of the United States, we do not think sufficient to establish his citizenship, in this country against the presumption which would arise from his home and his residence being in another.

The defendant's challenge should, therefore, have been allowed.

The objection to the record by the attorney-general is un-

Opinion of the Court—Lewis, C. J.

edly well taken, but as the time prescribed by the act, within which the bill of exceptions is to be taken by the judge, is merely directory, and the present *or bill of exceptions in this case being [*460] deemed to be correct, and as the dismissal of the case would result only in delay and further expense, we are justified in passing upon the merits at this time. (See *People v. Woppner*, 14 Cal. 437; *People v. Lee*, Id. 511.) Judgment reversed, and cause remanded for new trial.

MR. JUSTICE SMITH, J., did not participate in this decision.

1000

DECISIONS
OF
THE SUPREME COURT
OF THE
STATE OF NEVADA.

OCTOBER TERM, 1865.

PEOPLE EX REL. J. H. FLACK, APPELLANT, *v.*
THE BOARD OF COUNTY COMMISSIONERS OF
WASHOE COUNTY, RESPONDENT.

[1 NEVADA, 460.]

PROPERTY TAX OF WASHOE COUNTY.—Two-thirds of the property tax of Washoe county must be placed in the general fund. The law provides that this fund shall be paid out. The commissioners have no authority to make a change in this respect.

POLL TAX.—Two-thirds of the poll tax must also be paid into the general fund; there is no authority for paying it all into the indigent sick fund.

APPEAL from the District Court of the Fourth Judicial District, State of Nevada, Washoe county, Hon. C. C. BEATTY presiding.

These facts are stated in the opinion.

Flack & Flack, for Appellant.

vs. Fitch, for Respondent.

For the Court, BEATTY, J.:

This is a petition praying for the issuance of a [*461] writ of mandamus against the board of county commissioners of Washoe county to compel them to make an

Opinion of the Court—Beatty, J.

order for the distribution of the county revenue according to the provisions of a law passed at the last session of the legislature. The court below refused to issue the writ and gave judgment for costs against the relator, who appeals to this court.

The law referred to provides as follows: "The boards of county commissioners in the several counties of this state shall apportion all moneys coming into the county treasury, or so much thereof as is not by law set aside into special funds, as follows: Two-thirds shall go into the general county fund; one-sixth, or so much thereof as may be necessary, shall go into the indigent sick fund, and one-sixth, or so much thereof as may be necessary, shall go into the contingent fund, to defray the contingent expenses of the county."

The board of commissioners met in Washoe on the 3d of April, 1865, and made the following order:

"*Ordered*, That a tax of one dollar and fifty cents on each one hundred dollars of all the property in the county of Washoe, not exempt from taxation, be, and the same is hereby levied for county purposes. Said last mentioned tax shall be, and the same is hereby apportioned as follows: Forty cents on each one hundred dollars taxed shall be placed by the county treasurer in the general fund, heretofore created, to be applied to the payment of indebtedness heretofore contracted on that fund, which shall hereafter be known as the reduction fund; sixty cents on each one hundred dollars taxed shall be placed by the county treasurer in the general fund, to be applied to the payment of any indebtedness which may be hereafter contracted by the county on the general fund; forty cents on each one hundred dollars taxed shall be placed by the county treasurer in the contingent fund, to be applied to the payment of any indebtedness which may be hereafter contracted by the county on that fund; ten cents on each one hundred dollars taxed shall be placed by the county treasurer in the indigent sick fund, to be applied to the payment of any future indebtedness which may be contracted by the county on that fund.

Opinion of the Court—Beatty, J.

moneys arising from the sale of licenses
the act *of the legislature of the State of [*462]
entitled 'An act to provide for the support
government of the State of Nevada,' shall be placed
county treasurer in the general fund, and shall be
to the payment of any future indebtedness con-
by the county on that fund.

moneys arising from the collection of poll taxes
ing to the county shall be placed by the county
r in the indigent sick fund, and be applied to any
indebtedness on that fund."

order is wrong in several particulars. The law posi-
quires two-thirds of the property tax to be placed
eneral fund. Two-thirds in this case would be one
n the hundred of taxable property.

commissioners, it is true, have done this after a

But whilst they have placed that amount in the
fund, they have incorporated in the order certain
ve provisions about the division and expenditure of
ey in that fund, for which we find no authority in
creating the boards of county commissioners. The
re has directed this money to be paid into a general
Being once so placed, it can only be applied to the
; of warrants drawn by the auditor, in pursuance of
that particular fund. A law of the territory of
which remains in force under the state constitution
how warrants on the county treasury shall be pre-
nd registered, and that they shall be paid in the
their presentation. (See Laws of 1861, 287.)

t that law remains in force, the commissioners can-
le the general fund so as to make forty per cent-
that general fund payable on warrants according to
of their presentations, and the remaining sixty per
ereof payable on warrants of more recent date.
arrangement would doubtless be convenient for the
and enable the commissioners to conduct county
such more economically. But positive law cannot
side even to promote a laudable desire to economize
y expenditures. So much of the order of the com-

Opinion of the Court—Beatty, J.

missioners as directs all the money arising from the [*463] collection of poll tax belonging to the *county to be placed in the indigent sick fund, and applied only to the future indebtedness, is also wrong. Two-thirds of that fund belongs to the general fund.

The law having provided that the commissioners shall apportion one-sixth of the county revenue, or as much thereof as may be necessary, to the indigent-sick fund, and another sixth, or so much thereof as may be necessary, to a contingent fund, and no provision being made for what is to be done with the surplus, if either of these funds does not require the full amount of one-sixth of the county revenue, it becomes a question of some doubt how that surplus should be disposed of. Suppose the indigent-sick fund requires only one-twelfth of the whole county revenue to meet all its present and probable liabilities for the current year, clearly in such case the commissioners should only set apart one-twelfth of the revenue to such fund. The question then arises, what would become of the other twelfth? Will it all go into the general fund? Will it go *pro rata* into the general fund and contingent fund, or will it be discretionary with the commissioners to place the entire one-twelfth in either of the other funds that may best subserve the interests of the county? There does not appear to be any very satisfactory solution of this question. If one-sixth of the county revenue is more than enough for the indigent-sick fund in this county, the court, as at present advised, would not be disposed to control the discretion of the board in disposing of the fraction not appropriate to that fund.

With regard to the ordinary revenue of the county, arising from the property tax, poll tax and sales of licenses two-thirds thereof must be set apart for the general fund. There can be no restraint on the treasurer as to the manner of paying out that fund, except that imposed by law.

The judgment must be reversed, and the court below will issue a mandamus in accordance with the views expressed in this opinion.

Opinion of the Court—Beatty, J.

HUGUET, RESPONDENT, v. W. R. OWEN, APPELLANT.

[1 NEVADA, 464.]

ADINGS, WHAT COMPLAINT SHOULD STATE.—A complaint for money expended and services performed, should state the money was expended *for the use and benefit of defendant, and at his instance and request.*

ION FOR MONEY ADVANCED—EVIDENCE IN.—The opinion decides what proof was admissible under the facts of this case.

APPEAL from the District Court of the First Judicial District, State of Nevada, Storey County, Hon. RICHARD RISING siding.

The facts of the case are stated in the opinion of the court.

C. Foster, for Appellants.

Quint & Hardy, for Respondent.

By the Court, BEATTY, J.:

[*466]

This is an action in the nature of an action inumpsit. The complaint contained three counts: One for money expended to amount of four thousand six hundred and sixty-five dollars and eighty-seven cents in repairing defendant's mill; second, a count for percentage of four hundred and sixty-six dollars and fifty cents for disbursing the named sum; third, a count for five hundred dollars for services rendered.

The complaint then says plaintiff "has been paid on the sum [sum] so advanced by him for said defendant the sum of two thousand six hundred and fifty dollars and twelve cents," which being deducted from the aggregate amount of the three counts (five thousand six hundred and thirty-one dollars and thirty-seven cents), leaves two thousand nine hundred and eighty-two dollars and twenty-five cents, for which he claims judgment.

The cause was tried before a jury; verdict and judgment for the plaintiff for the whole amount of the demand. The defendant moved for a new trial, which was refused, and he appeals to this court, both from the order refusing a new trial and from the judgment rendered in the case.

Opinion of the Court—Beatty, J.

Appellant's first assignment of error is, that the court below erred in overruling a demurrer to the complaint. The demurrer was on the ground that the complaint did not state facts sufficient to constitute a cause of action. The defect complained of is this: that whilst the suit is for money expended, commission on the same, and for services, there is no allegation in the complaint that the money was expended for the use and benefit of defendant, nor that it was done at his instance and request. The same objection applies to the count for services. This is certainly a serious objection to the complaint.

It would be better for counsel always to use those technical words, the exact import of which have been long established, than others of doubtful import. In this complaint there are other things stated from which it may very clearly be inferred that the labor and expenditure were for the use and benefit of defendant, although these words are [*467] not used. It is not, *however, so apparent from reading the complaint (taking all for true) that all the services were rendered at the request of the defendant. The expenditures are said to have been made by his *authority*. Possibly this may be equivalent to request. But as this case must be reversed on other points, we merely allude to these apparent defects for the purpose of suggesting that before another trial the plaintiff shall so amend his complaint as to avoid all questions of this kind.

The second error complained of is in regard to the insufficiency of the proof to sustain the verdict, a point which need not be further noticed than as it is connected with the giving a certain instruction, which we will have occasion to notice presently. The third assignment of error, that the suit being for money expended in repairing a mill, there could be no proof as to the money expended for running a mill, will also be noticed in connection with the same instruction.

The court, among other instructions, very properly gave the following: "This is an action to recover money advances made by plaintiff as agent for defendant, his principal, in and about the repair of the Mariposa mill, belonging to defendant, from 11th March, 1863, to some time in June following, when the agency ceased.

Opinion of the Court—Beatty, J.

the pleadings, all the plaintiff can recover in this advances is the amount of money which he expended in and about the mill, in repairing the same so as to render it salable or profitable to rent.

The bill of items attached to, and made part of the plaintiff has included charges such as quicksilver, and other expenses incurred in working the mill, under the averments in the complaint, cannot be in this action; and therefore in determining upon what you will exclude from consideration all such items as do not properly pertain to the necessary repairs of the mill.

Accordingly enough, after giving this instruction, which was warranted by the complaint, the bill of particulars, and the evidence in the case, the court also gave the following instructions:

The jury, in estimating the damages, may deduct credits given against any item, or items, [*468] and may allow for items not charged for repairs, and allow for items properly charged for repairs, independent of the bill.

It may be remembered that the complaint charges that the plaintiff advanced and expended four thousand six hundred and fifty dollars and eighty-seven cents in repairs, and that he paid on the sums thus advanced, two thousand and fifty dollars and twelve cents.

On the trial, and even by inspection of the bill of particulars, it appeared that a considerable part of the four thousand six hundred and sixty-five dollars and eighty-seven cents was not expended in repairing the mill.

It is in regard to these expenditures, was, in effect, excluded from the consideration of the jury. Under the view of the case presented by the first instruction (and we think that was the proper view), no proof can be introduced by plaintiff in regard to those items which are not connected with the repairs of the mill, nor can a rebuttal be made by the defendant.

Points decided.

Yet, in order to allow the jury to give the plaintiff the demand, they are instructed that they may allow credits given in the complaint itself by these charges. A bill of particulars, which are not properly the subject of proof. This is certainly erroneous. It is, in effect, saying that the plaintiff, who sues for money expended in repairing a mill, and files a bill of particulars, showing the amount claimed was expended partly for repairing the mill, partly for various other objects, such as buying quicksilver, paying interest on notes, etc., may recover the whole amount of his bill by proving that the charges connected with the repairing of the mill are allowed. The other items of his bill would thus be disallowed, not only without proof, but without any allegation in the complaint that such advances had been made. There can be no practical difference between a disallowance of these items, and an allowance of them as an allowance of credits, which are, by the complaint, admitted to have been paid on the account for repairing the mill.

There are other points in the case not necessarily noticed.

[*469] *The judgment must be reversed and a new judgment awarded. The court below will allow the plaintiff to amend his complaint if he so desires.

THOMAS FOWLER, APPELLANT, v. GEORGE
HOUSTON, RESPONDENT.

[1 NEVADA, 469.]

DEATH OF DEFENDANT AN ISSUABLE FACT.—Where the death of a defendant is put in issue by the pleadings, it should, like every other issue of fact, be left to the jury.

FORECLOSURE OF MORTGAGE—DEATH OF PARTY TO.—Where the wife has no interest in the premises, and who was dead at the time of an action to foreclose a mortgage, is made defendant with her name, the proper practice upon her death being suggested, would be to omit her name and allow the plaintiff to proceed against her husband.

DEATH OF JOINT CONTRACTOR.—Where one of several joint contractors is dead, the survivors may be proceeded against without uniting the representatives of the deceased.

Opinion of the Court—Lewis, C. J.

REAL from the District Court of the Second Judicial
st, State of Nevada, Ormsby County, Hon. S. H.
T presiding.

ter & *Flundreau*, for Appellant.

iam *Patterson*, for Respondent.

the Court, LEWIS, C. J.:

[*471]

action was brought to foreclose a mortgage executed
defendant, George D. Houston, and his wife, Ellen
on. Upon the trial, the plaintiff having introduced
te, mortgage and assignment to himself in evidence,
his case.

defendant, George D. Houston, was then called on
n behalf, and testified that his wife Ellen had died
o the bringing of this action, whereupon defendant's
d moved the court upon this testimony to dismiss the
, predicated the motion upon the assumption that
Houston having died before the institution of the ac-
er representatives should have been joined as de-
nts. The court sustained the motion and entered
ent against the plaintiff for costs.

sustaining this motion the judge below must [*472]
overlooked the fact that the death of the de-
nt Ellen Houston was an issue of fact made by the
ings, and, unless admitted by the plaintiff, should
been submitted to the jury like any other issue of fact.
act of her death is alleged in the answer, and under
ractice, if the allegation is material, it is presumed to
nied by the plaintiff. (Laws of 1864, 74, Sec. 4.)
there was a direct issue of fact raised by the plead-
and the court, in dismissing the action, not only re-
d the testimony of the defendant Houston as incontro-
le, but took the case from the jury, and by so doing
ved the plaintiff of the opportunity of introducing re-
ng testimony, if he had any, upon that point.

the complaint had shown that the defendant Ellen
ston had no interest in the premises upon which the
gage was executed, the proper practice upon her death

Points decided.

being suggested would have been to strike out her name and to proceed against the other defendant. Where one of several persons liable on a joint contract dies, the survivors may be proceeded against without uniting the representatives of the deceased. (Chit. Pl. 42; *Mott v. Petrie*, 15 Wend. 318.)

The only ground, therefore, upon which the defendant, George D. Houston, could claim that his wife's representatives should be made defendants would be that they had some interest in the premises which were subject to the mortgage. The complaint does not show that Mrs. Houston or her representatives had no interest in the premises, but upon the motion to dismiss being made, the plaintiff offered to amend his complaint by adding an allegation to that effect, and he should have been allowed to do so. The court erred in dismissing the action and in refusing leave to the plaintiff to amend his complaint.

Judgment reversed and cause remanded.



W. B. THORNBURG, RESPONDENT, v. LUCIEN HERMANN, APPELLANT.

[1 NEVADA, 473.]

JURORS ENTITLED TO COMPENSATION.—Jurors are entitled to compensation for the time they are in attendance on the court, whether impaneled for the trial of causes or not, except when they are impaneled in the trial of criminal cases, and they reside within five miles of the court-house.

ACT OF LEGISLATURE—WHEN MUST BE APPROVED.—The act of the legislature approved December 22, 1862, regulating fees and costs, not having been approved until after the adjournment of the legislature, is null and void.

JURORS—CLAIM FOR FEES MUST BE AUDITED.—A juror's claim for fees on the certificate of the clerk should be audited like any other demand against the county.

APPEAL from the District Court of the First Judicial District, State of Nevada, Storey County, Hon. R. S. MEXER presiding.

The facts appear in the opinion.

Dighton Corson, for Appellant.

Opinion of the Court—Lewis, C. J.

Quint & Hardy and W. T. Barbour, for Re- [474]
ndent.

By the Court, LEWIS, C. J.:

The relator, Thornburg, in his petition to the district court of Storey county for mandamus, sets forth the following facts:

That having been duly summoned to appear in the district court of the first judicial district, to act as a trial juror, attended said court in that capacity from the 27th day December, 1864, to the 23d day of February, 1865; that thirty-three days of the time he so attended the court, he received no fees or compensation whatever; that the balance remaining due to him and unpaid, amounts to the sum of one hundred and sixty-five dollars. It is also shown that the appellant, Lucien Hermann, was at the time of rendering such service, and now is, the county clerk of the county of Storey, and also the clerk of said district court; that as such clerk it is his duty to give him, the petitioner, a certificate of the time for which he was so entitled to receive pay for his services as juror; that he demanded such certificate of the respondent, but that he, the said Lucien Hermann, has wholly failed, neglected and refused to issue such certificate to the petitioner. The appellant, after admitting in his answer that the petitioner was duly summoned to act as juror, as stated in his petition, denies all the remaining material allegations, and avers that three days is the entire time for which petitioner is entitled to pay, and that he has ever been ready to issue a certificate to him for the amount actually due, which the appellant claims is the sum of nine dollars.

The findings of fact by the court are substantially in conformity with those set forth in the petition, except that the time for which petitioner did not receive compensation is found to be thirty instead of thirty-three days.

Upon these findings a mandamus was ordered to be issued as prayed for. The principal point of difference between the relator and the defendant Hermann, arises upon the construction of section nine of an act entitled "An act to

Opinion of the Court—Lewis, C. J.

regulate fees and costs, approved November 29, A. D. 1861, the relator claiming that he is entitled to compensation for every day's attendance upon the court, whether actually impaneled or not, and the appellant contending that by a fair construction of the statute he is only entitled to compensation for the time which he is actually employed in court.

We may say in the outset, that the section referred to is extremely ambiguous, and that it is, perhaps, a moral impossibility to ascertain with any degree of certainty from the language employed what the real intention of the legislature was, and we know of no rule of interpretation which will favor one construction more than the other; we will be disposed, therefore, to adopt the construction which will seem most consonant to justice, and least likely to operate as a hardship upon individuals. After providing that jurors shall receive two dollars per day as fees from the party in whose favor the verdict is rendered, by the second clause of section nine it is provided that "in the district court and probate court the clerk shall keep an account of all moneys received for trials by each juror during the term, and if the sum so received by such juror shall not amount to three dollars per day, he shall deliver to such juror a certificate of the time for which he is still entitled to receive pay, which shall be paid out of the county treasury, as other county dues. No fees shall be allowed jurors in criminal cases, except grand jurors and trial jurors in the district court, who may be allowed two dollars per day for each day's actual attendance, and twenty cents per mile from [*476] their residence to the county court-house *only; provided, however, that they receive nothing unless they reside more than five miles from said county court-house." This section clearly settles the compensation of jurors at three dollars per day (except when employed in the hearing of criminal cases), but whether that compensation is to be paid merely for the time when a juror is actually engaged, or for the full time which he is in attendance upon the court, is left in doubt. If the amount which he receives from litigants does not "amount to three dollars per day, the clerk is required to deliver him a certificate of the time for which he is still entitled to receive pay."

And the question at once occurs, for what time is he entitled to pay? As a juror, when summoned to appear at a term of court, is usually compelled to neglect his own private business and often to leave his home, and to incur extra expenses in consequence thereof, it is but a matter of simple justice that the public who require his services should award to him a reasonable compensation. That he may not have been actually engaged in the trial of a cause during a term can make no difference in the justice of his claim, for he is compelled to be in daily and constant attendance upon the court and to hold himself in readiness at all times. A juror may be in daily attendance upon a court several months during the year, and from no fault of his may not be called upon to sit in a single case during that time. To hold that, under such circumstances, he would not be entitled to compensation would be a hardship which, in the absence of a clear and unequivocal law, we have no disposition to sanction. It may be within the power of the legislature to require the services of citizens in the capacity of jurors without providing any compensation, but where that has not been clearly done, and the existing laws can be construed as to allow a fair remuneration, natural justice, which should be the foundation of all law, makes it the duty of the courts to adopt such a construction.

As to jurors in criminal cases who reside within five miles of the court-house, the law is clear and explicit, that they shall receive no compensation, and whatever may be the policy of such a provision we have no power to void it, but except in such cases it must be [*477] admitted the intention of the legislature is very uncertain.

We are therefore disposed to adopt what seems to be the most just rule, that jurors shall receive pay for the time they are in attendance at court, except the time during which they may be impaneled in criminal cases.

We are aware that this construction may produce some absurd results, so will any construction which we can adopt be inconsistent with the language of the law, and it is the one which all the courts have heretofore acted upon. These

Points decided.

difficulties in all future cases in the county of Storey are however obviated by the act of 1864-5.

The act approved December 23, 1862, regulating fees and costs, not having been approved before the adjournment of the legislature, is null and void. (*School Trustees v. Commissioners of Ormsby County, ante*, 334.)

We think that the certificate of the clerk to the juror should be audited like other claims against the county. It is expressly provided (Statutes of 1864-5, sec. 9, p. 259), that "every demand except the salary of the auditor and district judge or judges, shall be acted on by the board of county commissioners, and allowed or rejected in order of presentation, and must, after having been approved by the board of county commissioners, before it can be paid, be presented to the county auditor to be allowed." True respondent's claim had become due before the passage of this law, but suit had not been commenced, and the requirement in no way affects the obligation of the contract in this case, but merely directs the manner in which it is to be enforced without in the least impairing the right. This case does not come within the rule of those cases relied on by respondent's counsel.

Judgment affirmed, with this modification, that the certificate be issued for thirty instead of thirty-three days.

JAMES D. CHAMPION, APPELLANT, v. E. C. SESSIONS
ET AL., COMMISSIONERS OF THE COUNTY OF
WASHOE, RESPONDENTS.

[1 NEVADA, 478.]

JUDGMENT ENTERED IN VACATION VOID.—A judgment rendered during vacation on demurrer is irregular and void.

ACTION AGAINST A COUNTY.—An action brought to restrain the county commissioners from opening a road is not an action against a county.

WORDS DESCRIPTIO PERSONARUM.—The words "County Commissioners of Washoe County" following the names of the defendants in an action are merely *descriptio personarum*, and are not in themselves sufficient to make it an action against the county.

COURTS OF EQUITY.—ADEQUATE REMEDY AT LAW.—In cases of this kind where a complete and adequate remedy can be had at law, a court

Opinion of the Court—Lewis, C. J.

ity will not interfere; but on the other hand, if the injury is likely to be irreparable, or if the defendant be insolvent, equity will always repose its power to protect a person from a threatened injury.

NOTE—WHEN IT WILL BE ISSUED.—The legislature has an undoubted right to confer upon the county commissioners power to open roads, and a proper compensation being made to those whose property is taken for such purpose, but until such compensation is made, there is no power within the state which can legally appropriate the property of a citizen, except in certain cases mentioned in section 2, article 1, of the state constitution.

CALL from the District Court of the Fourth Judicial District, State of Nevada, Washoe County, Hon. C. C. LUTHER presiding.

Sufficient facts appear in the opinion.

Walter & Flandreau, for Appellant.

W. H. & Harris, for Respondents.

The Court, LEWIS, C. J.:

The plaintiff in this action filed his bill for an [*481] injunction restraining the defendants from opening a road through his premises in Washoe valley. To complain the defendants interposed a general demurrer, which being sustained by the court below, judgment for the plaintiffs was rendered against the plaintiff on the 29th day of July, A. D. 1865, from which judgment he takes this appeal.

It appears by the record that the demurrer was sustained, the preliminary injunction dissolved, and judgment rendered in favor of the defendants on the 29th day of July, A. D. 1865, which was in vacation. The restraining order granted by the court might have been dissolved upon a showing at chambers, but [*482] to allow the argument of a demurrer to sustain or overrule the order and render judgment thereon in vacation, is clearly error, and a judgment so rendered would doubtless be reversed. It may be observed, however, that the appellant does not appeal from the order or judgment rendered in vacation, but from a final judgment rendered afterwards, during the August term of the court. The fact of the

Opinion of the Court—Lewis, C. J.

demurrer having been argued and sustained at chambers does not make a judgment subsequently rendered upon such demurrer during a regular term of the court a nullity. There is, therefore, no foundation for respondents' motion to dismiss the appeal. The position of counsel in support of the demurrer seems to be equally untenable. It may be admitted that no action can be maintained upon a money demand against a county until the claim is presented to the county commissioners and disallowed, and a failure to allege such presentation might be a fatal defect in the complaint; but this is not an action for the recovery of money, and the law declares "no person shall sue a county in any case for any demand, unless he or she shall first present his or her claim or demand to the board of county commissioners and county auditor for allowance," has reference only to money demands, a fact which is perfectly clear from the language of the act itself. The relief sought by the plaintiff is not damages for an injury done, but an injunction to restrain the defendant from the commission of an illegal act which he alleges would result in irreparable injury. If the road in question had been opened at the time this action was commenced, and the plaintiff had brought his action merely to recover damages, the position taken by the court below in its opinion would undoubtedly be correct. That is not, however, the case. His object is to prevent the commission of a trespass, not to recover damages for one already committed.

The value of the land, or the actual damage he would sustain from the opening of the road through his premises, may be no compensation for the inconvenience or injury which the plaintiff might suffer from the threatened action of the defendants. The plaintiff, having suffered no damage, and the relief sought by him being only for an [*483] apprehended injury, he had *no claim to present to the commissioners. But should there be any doubt upon this point, there is none whatever that this is not an action against the county, which of itself completely disposes of this case.

The words "county commissioners of the county of

Opinion of the Court—Lewis, C. J.

shoe," after the names of the defendants, are merely *ripiatio personarum*, and cannot by any possible means be this an action against the county. No judgment should have been rendered against the county upon the complaint. It would not be claimed for a moment that an action against an individual described as the county clerk or treasurer in the complaint would be an action against the county, and yet there seems to be no reason why it should be, any more than an action against certain persons described as county commissioners should be.

Indeed, whether the powers of a court of equity may be invoked to restrain the illegal opening of a public road through the premises of a person where it is not clearly shown that it would produce irreparable injury, or that the defendant is insolvent, is the only question in the case which seems to admit of argument. In cases of this character, when a complete and adequate remedy can be had at law, it is settled that a court of equity will not interfere; on the other hand, if the injury is likely to be irreparable, or if the defendant be insolvent, equity will always impose its power to protect a person from a threatened injury.

We find one allegation in the complaint which we think brings the plaintiff within the pale of the equity jurisdiction of the court and entitles him to the relief prayed for. That allegation is as follows: That the ranch of the plaintiff, through which the same is proposed to be opened, is of irregular proportions and easily cultivated; that the opening of said road through the same in the manner proposed by the said defendants will greatly disfigure said ranch, and largely increase the expense and render the same much more difficult to cultivate. Here an injury, which would be continuous and irreparable in its character, would appear to be the result of opening the road in question. It is an injury to the inheritance, impairing the just enjoyment of the property in the future, *and one [*484] which would have fully justified the issuance of the injunction. (*Bonaparte v. Camden & Amboy R. Co.*, 1 Bald. 231; *Mohawk & Hudson R. Co. v. Archer*, 6 Paige, 2 Story's Eq. Jur., secs. 928, 929.)

Opinion of the Court—Lewis, C. J.

The legislature has an undoubted right to confer upon the county commissioners the power to open roads whenever they may deem it necessary, upon a proper compensation being made to those whose property is taken for such purposes. But until such compensation is made, there is no power within the State which can legally appropriate the property of the citizen for such purposes, except in certain cases mentioned in section 8, article I. of the Constitution of the state.

Judgment reversed and cause remanded. The court below will reinstate the case and take such proceedings as the equity of the case may require, not inconsistent with the views expressed in this opinion.

J. H. PERAN, RESPONDENT, v. U. P. MONROE ET AL.,
APPELLANTS.

[1 NEVADA, 484.]

NOTICE OF APPEAL—WHEN MUST BE FILED.—Where the notice of appeal is filed one day before the expiration of the time limited for taking an appeal, but the undertaking is not filed until three days after the expiration of that time, but within five days after the filing of the notice of appeal. *Held*, that the appeal was taken within the year allowed by statute.

¹ APPEAL—HOW TAKEN.—An appeal is taken by the filing and service of the notice, but it is effectual for no purpose until the undertaking is filed.

Appeal from the District Court of the Ninth Judicial District, State of Nevada, Esmeralda County, Hon. S. B. CHASE presiding.

The facts appear in the opinion.

J. Neely Johnson and *W. T. Gough*, for Appellants.

Thos. Wells and *W. M. Seawell*, for Respondent.

[*486] By the Court, *LEWIS, C. J.:

It appears from the record in this case that the judgment of the court below was rendered on the 12th day of July A. D. 1864; that notice of appeal was filed and served on

Opinion of the Court—Lewis, C. J.

ondent's counsel on the 11th day of July, A. D. 1865; it seems the undertaking was not filed until the 15th of , which was more than one year from the day the de- was rendered. Upon these facts it is claimed, on behalf he respondent, that the appeal was not taken within the e limited by statute, and should therefore be dismissed. o appeal is taken until an undertaking is filed, unques- ably the respondent is correct in the position he has n upon this motion. The practice act, will however, it of a different, and what appears to us to be a more ect construction. Sec. 275, Laws of 1861, expressly ares that the appeal shall be made by filing with the : of the court with whom the judgment or order ap- ed from is entered, a notice stating the appeal from the ; not the filing of a notice *and* undertaking, as claimed espondent. Sec. 286, p. 363, it is true, declares that render an appeal effectual for any purpose in any case, itten undertaking shall be executed on the part e appellant by at least two *sureties." An ap- [*487] may, however, be *taken*, though not completed fectual for any purpose until the undertaking is filed. appeal is taken by filing and serving the notice, and appeal so taken becomes effectual or complete only by iling of an undertaking within five days after such no-

The failure to file such undertaking within five days ers the filing of the notice nugatory, but if filed within time the last act relates back to the first, and the ap- becomes complete. Should we hold that an appeal is taken until the undertaking is filed, it would be in direct ict with section 275, above referred to, which declares the appeal shall be made by filing and serving the no-

These sections must be construed together so as to full effect to the language of both, if it be possible, and can only be done by holding that the appeal is *taken* by g and serving the notice.

pon the merits of this appeal nothing need be said, as uestion involved has already been passed upon by this t. (*Burling v. Goodman*, ante, 314.)

dgment reversed, and cause remanded for further pro- ings.

Opinion of the Court—Beatty, J.

DAVID DAVIS, APPELLANT, v. JOHN S. BOWKER,
RESPONDENT.

[1 NEVADA, 487.]

RELEASE OF JUDGMENT.—If a plaintiff, in consideration of one hundred dollars paid to him, and a promise made by defendant to do certain other things which would be advantageous to him when performed, agrees to release a judgment for two hundred dollars, this is not a release or satisfaction of judgment until the promise is performed. But if on such consideration, the plaintiff executes a technical release *in presenti*, the failure to perform the promise will not reinstate the judgment.

IDEM—MUST BE UNDER SEAL.—A release must be under seal.

IDEM—WHEN CONTRACT IS NOT EXECUTED.—If a hundred dollars be paid in part consideration of a release, to be thereafter executed, of a judgment for a larger amount, and the contract for the release fall through, the one hundred dollars may, under certain circumstances, be applied as a credit on the judgment, which, upon the performance of other acts, was to have been released.

APPEAL from the District Court of the Fourth Judicial District, State of Nevada, Washoe County, Hon. C. C. GOODWIN presiding.

William Webster, for Appellant.

Thomas Fitch, for Respondent.

By the Court, BEATTY, J.:

The facts of this case are as follows: The defendant, Bowker, obtained a judgment against T. J. Davis and one Bedwin, in the month of February, 1864, for some [*489] thing over two hundred dollars. There was at the time some difficulty or controversy between the same parties about the possession of a tract of land. Soon after the judgment was obtained the parties met and had an adjustment of their difficulties. An arrangement appears to have been made by which Davis and Bedwin were to pay one hundred dollars and surrender all claim to the disputed land, in full satisfaction of the judgment which had been obtained for a little over two hundred dollars. A written instrument was executed in regard to some part of this contract, and witnesses called to take notice of and remember

Opinion of the Court—Beatty, J.

nts. The hundred dollars was paid; something was one thereafter in relation to the yielding up of the on and claim to the land in dispute.

ly after this agreement J. T. Davis sold a piece of te which had been subject to the judgment lien in

Bowker to the present plaintiff, David Davis. J. s and Bedwin did not yield up the possession of the they had agreed to do in the presence of witnesses. on Bowker issued his execution, levied on the land ad been sold to David Davis, sold the same at : sale, and himself became the purchaser. David les his bill praying to have the sale set aside, the te of purchase surrendered, and the judgment in Bowker released on the record. He claims this n the alleged ground that Bowker had released his t before the sale of T. J. Davis to himself. The refused the relief prayed for and plaintiff appeals. a very simple case; the plaintiff's title to the relief depends entirely on the fact of whether Bowker did his judgment at the time alleged. If Bowker only o release the judgment at some future time, and a the consideration which induced him to make that nt was withheld, equity would not compel him to e release. The utmost that equity could do, would pply the one hundred dollars which was paid by d Bedwin to the judgment, and thereby reduce the t lien to that extent. But if there was an absolute *in presenti*, that terminated the judgment lien on the te of defendants (Davis and Bedwin), and no future n their part to comply with their agreement rrendering *a litigated claim to land could [*490] he judgment. The case, as it now stands,

resents but one single proposition. Did Bowker a release to Davis and Bedwin? As the paper as executed by Bowker when the settlement was r agreed on in February, 1864, is not in the tran- ve cannot say whether it is or is not a release. In- here is nothing in the transcript by which we can ne whether that paper is still in existence, whether roduced on the trial, or its contents proved.

Opinion of the Court—Beatty, J.

Among other questions propounded to the jury, and on which they were required to find, were the following: 3. "Did or did not the defendant, John S. Bowker, execute and deliver to Thomas J. Davis his certain written release on or about the 20th of February, 1864, and prior to the sale of the premises described in the complaint to plaintiff? 4. Did or did not the defendant, by his release in writing, agree to release Thomas J. Davis from further liability on the judgment on which execution issued and sale was made by the sheriff of the premises described in the complaint of plaintiff, to wit: Lot 2, block 1, in Range F, in Washoe city?" Both of which were answered in the affirmative. The answer to the third interrogatory would satisfy us that a release had been executed but for the expression *written release* being used, which rather indicates that the parties proposing this question supposed that an instrument in writing, but not under seal, might be a release. Indeed, the complaint indicates the pleader thought the same thing when drafting the complaint. The fourth interrogatory indicates a failure to discriminate between a release and an agreement to release at a future time. It seems to have been a submission of the question to the jury whether a release is an agreement to release. The other questions submitted to the jury are all in regard to facts which are perfectly immaterial as the pleadings stand. No portion of the evidence is in the transcript, and we are unable to determine what the decree should have been. The opinion of the court below is in writing, and contains this language: "The facts are, briefly, that in February, 1864, defendant obtained a judgment against one Jeff. Davis; that the same day defendant executed a release to said Davis of all [*491] demands, of whatever nature. The release ^{was} in writing, but there was a verbal agreement also between the parties, made in the presence of witnesses, that the release was only to take effect upon the fulfilling of certain conditions on the part of Davis. Davis broke his agreement, and Bowker issued execution on his judgment and sold the house and lot in question." If the defendant did execute a release to T. J. Davis of all demands of whatever

Points decided.

re, it is certain that put an end to the judgment. There shall be no subsequent valid sale under a judgment that is released. The verbal agreement spoken of by the court could not be received in evidence to vary or explain the provisions of a release. If there was a release executed and delivered, then the case was erroneously decided. Supposing that the judge below, when he says the defendant executed a release, means what he says, the case is reversed and sent back for further proceedings. But from the expression used that "the release was in writing," we have some doubt whether it was a release at all. To prevent further trouble in the trial of this case, we will say, a release must be under seal, and no writing, not under seal, amounts to a release. If there was an absolute technical release, then the plaintiff would be entitled to the remedy he seeks. If the writing referred to by the court was a jury was not under seal, and shows that one hundred dollars was paid, and in consideration thereof Bowker agreed to release the judgment, which was for over two hundred dollars, the court cannot enforce that agreement, literally, but may, under proper circumstances and with proper findings have that one hundred dollars applied as a credit on the judgment lien, and allow the plaintiff in this case to redeem the land by paying the amount of the judgment and costs, less the one hundred dollars already paid by T. J. Lewis and Bedwin.

Lewis, C. J., did not participate in this decision.

IN W. KELLER, RESPONDENT, v. HENRY G. BLASDEL, JOHN FALL, DR. PINKERTON, ET AL.,
KNOWN AS THE BUILDING COMMITTEE OF THE METHODIST EPISCOPAL CHURCH, APPELLANTS.

[1 NEVADA, 491.]

LIABILITY.—"Persons jointly liable must all be made defendants, and a joint judgment rendered against all.

ACTS—WHEN ABANDONMENT PRESUMED.—When one of the parties to a written contract fails to sign it, the presumption is that he has abandoned it. To overcome such presumption it is necessary for the party relying on the contract to prove that the other party authorized or encouraged him to proceed under the contract.

Opinion of the Court—Lewis, C. J.

APPEAL from the District Court of the First Judicial District, State of Nevada, Storey County, Hon. RICHARD RISING presiding.

Reardon & Hereford, for Appellants.

Taylor & Campbell, for Respondent.

By the Court, LEWIS, C. J.:

This action was brought to recover the sum of fifteen hundred and sixty dollars for work and labor performed on the Methodist Episcopal Church in the city of Virginia. The plaintiff declares against four defendants, styling them the building committee of the Methodist Episcopal Church. A jury having been waived, the case was tried by the court, who found as a matter of fact, "that the plaintiff, in the months of October and November, 1863, at the instance and request of H. G. Blasdel and one Prince, performed work and labor, furnished and delivered materials, in and about the plastering and cornice work upon the premises known as the Methodist Episcopal Church in the city of Virginia," and after finding the value of the work and materials furnished, and also the amount paid plaintiff on the contract, finds as a conclusion of law, that the plaintiff is entitled to judgment against the defendants Blasdel and Prince for the sum of thirteen hundred and thirty-eight dollars, and judgment for that sum was regularly entered. There is scarcely a scintilla of testimony in the record to sustain the finding of the judge below, or to authorize a joint judgment against the appellants. It appears from the evidence that a contract was drawn up between the plaintiff and the building committee of the church, which [*493] *was signed only by himself. It also appears from his own testimony that Paul, Deal, Prince and Anthons were the persons who were to execute it on behalf of the committee. Though signed by himself alone, the plaintiff seems to have treated the contract as fully executed, and acted upon it accordingly. No other contract is shown between himself and the committee. No explanation

Opinion of the Court—Lewis, C. J.

as to why the one above referred to was not those who were to execute it; nor is there any way to show that the committee had anything whatever to do with the contract above referred to, either by authorizing it to be drawn up or subsequently ratifying it. If it was drawn up by their authority, and they merely neglected to execute it, without intending to abandon it altogether, either by their silence or otherwise encouraged him to proceed with the work, he not knowing that he was merely acting as the agent of the church association, he would undoubtedly be liable either on the written contract for the reasonable value of the work so performed, or on the other hand, if the contract was entirely unauthorized by the committee, and the plaintiff went on to perform the work without any authority from them, they cannot be held liable to him. Whether this was in fact the case is impossible to determine from the evidence presented in the transcript. The presumption which arises from the failure to execute the contract is, that it was entirely abandoned. To overcome this presumption, the plaintiff should have shown that the committee, in fact, authorized or encouraged him to proceed with the work. This is not done. The plaintiff, therefore, cannot make out a case against the building committee as such, even if it be admitted that the evidence is sufficient to establish the plaintiff's case against the committee, the conclusion is erroneous, for if any liability whatever be established, it is a joint, and not a several liability, and the judgment should have been rendered against all the members of the committee or none. Persons jointly liable cannot be made defendants, and a joint judgment rendered against them. It is shown by the testimony in this case that the persons besides those against whom judgment was rendered were members of the committee, and were jointly liable, if indeed any of them can be [*494] held liable. It only remains to be determined whether the evidence in the case establishes any liability on the part of the defendants, against whom judgment is rendered, or of the building committee. We think it does

Opinion of the Court—Lewis, C. J.

not. The only expression in the entire testimony from which any individual liability might be inferred are the following sentences which occur in the plaintiff's testimony: "I did the work named in the complaint. I did it for the defendant Blasdel, as I thought." But this expression, taken in connection with the balance of his evidence, clearly shows that no such individual liability exists.

Plaintiff shows by his own testimony that he treated the contract with the committee as fully executed and binding upon them, and that he did the work under it. He also swears that the only parties who were to sign that contract were Paul, Deal, Prince and Anthons. How is it possible, then, that he thought he was doing the work for the defendant Blasdel? The plaintiff seems to have concluded that because the contract was drawn up at the request of the defendant Blasdel, he was liable upon it. He says: "I made the contract with Governor Blasdel;" and yet the contract itself shows that it was not with him, but with the building committee, for that is the only contract referred to in the testimony. The fact that the defendant Blasdel was not to sign it is conclusive that he did not intend to be bound by it, and there is no evidence of any other contract between him and the plaintiff. There is no evidence whatever tending to establish any liability on the part of the defendant Prince, independent of the other members of the committee, or jointly with the defendant Blasdel. As there were several other members of the committee, it was error to render judgment against him as one of the several joint contractors.

Judgment must be reversed and cause remanded.

W. VAN VLIET ET AL., RESPONDENTS, v. A. S. OLIN
ET AL., APPELLANTS.

[1 NEVADA, 495.]

JUDGMENT, WHEN NOT A BAR.—A judgment not upon the merits is not a complete bar, nor can it be used as evidence in another action to establish the facts constituting the merits of the action in which it was rendered.
DISMISSAL.—The voluntary dismissal of an action by the plaintiff can settle no rights of property between him and the defendant, nor is it an admission of any right whatever in the defendant.

APPEAL from the District Court of the Second Judicial District, State of Nevada, Ormsby County, Hon. S. H. RIGHT presiding.

Atwater & Flandreau, for Appellants.

Clayton & Clarke, for Respondents.

By the Court, LEWIS, C. J.:

Upon the trial of this cause, which was brought to quiet title to certain premises in the county of Ormsby, the plaintiffs introduced in evidence the records in an action of ejectment tried in one of the district courts of the territory, in August, A.D. 1862, in which the present defendants, A. S. Olin and Thomas J. Andrews were plaintiffs, and W. W. Van Vliet and Enos P. Tucker, the present plaintiffs, together with eight others, were defendants. It appears that before the action came on for trial, the plaintiffs, Olin and Andrews, dismissed it as to the present plaintiffs, Van Vliet and Tucker, but proceeded against the other defendants and obtained judgment against them.

The court below in this case, treating the dismissal of that action as an admission of the title of Van Vliet and Tucker, and as a judgment upon the merits in their favor, charged the jury as follows:

If you find from the proof before you, that in the trial of any cause by a court of competent jurisdiction, the plaintiffs in this suit, or their grantors, either by the confession of said *defendants or by the findings and [*496] judgment of said court, obtained a judgment against

Opinion of the Court—Lewis, C. J.

the defendants A. S. Olin and Thomas A. Andrews, for the property in controversy, then, unless you find that the defendants A. S. Olin and Thomas A. Andrews have, since said judgment, acquired new rights and ownership in the premises paramount in law to the rights and title of the plaintiffs, you must find for the plaintiffs."

Had the plaintiffs in fact recovered a judgment on the merits in the action referred to, the instruction may have been correct; but as they did not, it was only calculated to lead the jury to the conclusion that the dismissal of that action constituted such judgment, and should therefore not have been given. The court, in giving that instruction, must have considered the discontinuance of the action of ejectment as tantamount to a judgment on the merits in favor of Van Vliet and Tucker, and a complete adjudication of the title between the parties thereto up to the time of its disposition. This was not the case. A judgment not upon the merits is not a complete bar, nor can it be used as evidence in another action to establish the facts constituting the merits of the action in which it was rendered. "It is only where the point has been *determined*," says Greenleaf in his work on Evidence (vol. 1, sec. 529), "that the judgment is a bar. If the suit is discontinued or the plaintiff becomes nonsuit, or for any other cause there has been no judgment of the court upon the matter in issue, the proceedings are not conclusive." As to the parties in this cause, nothing whatever was determined in the action of ejectment, except that at the time it was discontinued Olin and Andrews did not wish to proceed against the present plaintiffs. It will not be seriously claimed by counsel that a voluntary dismissal of an action by the plaintiff determines it upon the merits in favor of the defendant. And yet this seems to have been the position taken in the court below. The court, therefore, not only erred in giving the foregoing instruction, but also in refusing to give the following at the request of the defendants:

"The judgment or order dismissing as to defendants Van Vliet and his associates, in the suit of Andrews and Olin against Stonecifer and his associates, and Van Vliet and his

Points decided.

as, settled or determined no rights to the [*497] in question as between the parties to that to the present one."

g can be more obvious than that an order made on tiff's own motion dismissing an action of ejectment no rights of property between the parties thereto. ruction should therefore have been given. Neither dismissal of an action be treated as an admission of or title in the defendants. It is itself an admission g except that at the time the plaintiff does not wish d against the defendant. The action of ejectment to may have been discontinued as to Van Vliet and merely because the plaintiffs in that cause con- at they should not have been joined with the other ts, or they may have ascertained that they were ct in possession of the premises, or indeed, for er reasons which would in no wise be an admission ght or title in the defendants, and it was error to s such.

nd other errors in the instructions given to the as they will not be likely to occur again and this of the appeal, we do not deem it necessary to pass m.

ent reversed and new trial ordered.

E L. GIBSON, RESPONDENT, v. G. W. CHEDIC
ET AL. S. B. MARTIN, APPELLANT.

[1 NEVADA, 497.]

ED—WHEN MAY BE REVOKED.—When a deed is made in trust for mefit of creditors, and they refuse to accept its terms, the party g the conveyance may revoke it.

RE OF MORTGAGE—RIGHTS OF PURCHASER.—When a party holding l mortgage purchases at a judicial sale under the first mortgage, ere is no redemption by the second mortgagee, his title becomes te and the second mortgage is cut out.

L from the District Court of the Second Judicial , State of Nevada, Ormsby County, Hon. S. H. presiding.

Opinion of the Court—Beatty, J.

J. J. Williams and Thos. E. Haydon, for Appellants.

R. M. Clarke, for Respondent.

[*499] *By the Court, BEATTY, J.:

This is an equity case arising out of the following state of facts: In 1862, Milne and Chedic are alleged to have been the owners of a saw-mill and a large tract of land in Ormsby county. January 25, 1862, Chedic mortgaged his undivided interest to Jonathan Wilde, for one thousand dollars. April 30, 1862, he gave a second mortgage to plaintiff Gibson, to secure a note for one thousand dollars, with interest at ten per cent. per month from date.

May 17, 1863, Milne united in a mortgage to S. B. Martin to secure seven thousand dollars and interest. This last mortgage included not only the mill and land owned jointly, or as tenants in common, by Milne & Chedic, but also the separate homestead property of Chedic. In the summer of 1862, Wilde commenced suit to foreclose his mortgage. Judgment was had on the 26th of November, 1862. Chedic's interest in the land and mill property was sold under Wilde's decree, and he became the purchaser.

In May, just before the expiration of the six months after sale, S. B. Martin, as a holder of a subsequent mortgage, redeemed the same by paying the amount of Wilde's lien, with lawful percentage and charges. There being no subsequent redemption from him after the expiration of more than sixty days, he obtained a sheriff's deed for that interest. This deed was dated in July, 1863.

During the summer of 1862, about the time Wilde was instituting or prosecuting his foreclosure suit, Milne & Chedic being greatly embarrassed, conveyed the mill property and land adjacent to one Lewis, nominally for twenty thousand dollars, but by a verbal arrangement between the parties, it was agreed that Lewis should hold the

[*500] land in trust to pay certain creditors *of Milne & Chedic, the expense of running the mill, etc., (including a compensation agreed upon for his services), and after the net profits of the mill had paid these debts of

Opinion of the Court—Beatty, J.

e & Chedic, the property to be redeeded to them. s found, after accepting the deed, that he could not ate the trust. Some, if not all, of the creditors, ob- d to the arrangement.

se laborers employed upon the mill would not work for

Lewis finding his scheme impracticable, took no in executing the trust. It is not shown that a single of the creditors for whose benefit, in part, the trust was ed agreed to accept it, whilst some expressed their dis- in the most positive terms. Under this state of things appellant Martin came to Carson to look after his inter- in this property, he having a mortgage for seven thou- dollars on the same, and a piece of property belonging idually to Chedic. He applied to Lewis to know about interest or claim upon the property. Lewis stated the umstances attending the execution of the deed to him- admitted he held the title in trust for Milne & Chedic, he was unable to execute the trust, and would deed the to Martin if so requested by Milne & Chedic.

fter some negotiation between the parties, it was agreed the land should be deeded to Martin—that if Chedic or wife should pay two thousand dollars to him within t months, he would credit the same on his mortgage, release Chedic's homestead. Chedic tried to get him lease the homestead simultaneously with taking the l to the mill property and the lands; but this he refused o because the property for which he was getting a deed not, in his opinion, worth the full amount of his mort- and the prior liens.

pon this state of facts the referee who tried the case d that Martin took the deed from Lewis, subject to all trusts under which Lewis received it, and that he, hold- the land as trustee for Milne & Chedic, and their cred- t, when he redeemed from Wilde, redeemed not for self, but as trustee for Milne & Chedic and their cred- . The referee held that Martin took the title to this as trustee for these parties, because Lewis so it, and Martin taking a deed from Lewis, *with [*501] ledge of the fact that he held it subject to these

Opinion of the Court—Beatty, J.

trusts, must also be treated as holding under the same trusts. The appellants contend, First. That the deed to Lewis, being absolute on its face, no unwritten parole evidence could be introduced to show it was in fact a deed made in trust for the purposes explained by the parole evidence. Second. That if such proof could be legitimately introduced, still this conveyance could not be held to operate as a deed in favor of creditors who absolutely reject its provisions. The first point it is not necessary to discuss. We believe it to be settled law that when a deed is made in trust for the benefit of creditors, and they refuse to accept its terms, the party making the conveyance may revoke it (Story Eq. Jur., Sec. 1036.) Admitting that this was a trust deed to Lewis for the benefit of creditors, and these creditors refused to accept of its terms, Milne & Chedic clearly had a right to revoke it. That revocation might have been made by deed. It might have been effected by procuring Lewis to re deed the land direct to them, or to deed it to third party for a consideration, to be paid by that party to them. It appears to us that this was precisely the nature of the transaction between Martin, Milne & Chedic & Lewis.

The deed of Lewis to Martin, made with the assent of Milne & Chedic, and upon a consideration passing between them and Martin, operated as a revocation or extinguishment of the trust. The creditors were not injured (at least they had no right to complain) by this arrangement, because they had either positively refused to accept the terms of the trust, or had failed to give notice of their acceptance.

In either case the trust deed was revocable without consulting them. That it was not the intention of any of the parties to this transfer to Martin that he should occupy the position of trustee for the general creditors of Milne & Chedic is evidenced by the fact that, in his negotiation with the other parties, he refused to accept the deed and release his mortgage, because the property was not of sufficient value to pay his debt and prior liens.

It is not to be supposed he would have accepted a position of trustee which would have put other debts not in

Points decided.

on upon the property (such as the demands of hands) ahead *of or on the same footing with [*502] debt. The whole transaction indicates that he was desirous of obtaining possession of the property, as trustee for others, but to make his own debt more secure. The other parties to the deed were willing to give him that position with whatever advantage he could derive from Lewis' deed upon consideration of his making a favorable arrangement with Chedic about releasing his home. We are of the opinion, then, that Martin did not occupy the position of trustee for the creditors, or any of the creditors of Milne & Chedic, but that he either stood as the holder of the fee of the land for his own use, and subject to the prior incumbrances, or else he held the position of third mortgagee, with the equitable right to redeem and from the prior mortgagees and hold it as security for his original debt and his expenditures to redeem it from the prior mortgages. In either case his rights were the same. If he bought in or paid off the prior mortgages, he extinguished the lien on the land for the amount thus expended. But there was a judicial sale under the senior mortgage on the property, and he purchased at that sale, or redeemed the property, and he purchased, and obtained a sheriff's deed, and put him in possession of a full and complete title to the land, so far as the mortgagor had title when he executed the mortgage. This, of course, cuts off all junior mortgages. The cause is reversed, and the plaintiff's bill will be dismissed by the court below.

ROBERT A. GRAY, RESPONDENT, v. L. A. HARRISON,
ET AL., APPELLANTS.

[1 NEVADA, 502.]

FROM AN ORDER MADE ON AFFIDAVITS.—Where an appeal is taken from an order made on affidavits no statement is required, and those provisions of the practice act making it the duty of the appellant to prepare a statement containing the grounds upon which he intends to rely on appeal, have no application to an appeal from such an order.

Opinion of the Court—Lewis, C. J.

NEW TRIAL—CUMULATIVE EVIDENCE.—That only is cumulative evidence which is in addition to or corroborative of what has been given at the trial. To render evidence subject to this objection, it must be cumulative, not with respect to the main issue between the parties, but upon some collateral or subordinate fact bearing upon that issue.

IDEM.—If the newly discovered evidence brings to light some new fact bearing upon the main question, and it would be likely to change the result, a new trial should be granted.

[*503] ***APPEAL** from the District Court of the First Judicial District, State of Nevada, Storey County, Hon. R. S. MESICK presiding.

Perley & De Long, for Appellants.

Quint & Hardy, for Respondent.

[*507] *By the Court, LEWIS, C. J.:

One of the grounds upon which a new trial was claimed in this cause was the discovery of new evidence material to the issue after the trial. By the affidavit of the defendant Shad it is shown that he is the only defendant having any interest in the action; and that after the trial he had learned new facts material to his case, which, notwithstanding the diligent inquiry made by himself and his attorneys, had not been discovered until after the trial. The newly discovered evidence is fully set forth in the affidavits of U. P. Hutchings and David S. Turner, the witnesses by whom defendants expect to present the same. These affidavits, together with a statement containing the evidence produced at the trial, were filed within the proper time; the motion for new trial was made and overruled, and defendants appeal from the order denying it. It is agreed between the counsel for the respective parties that the statement on motion for new trial shall constitute the statement on appeal; but counsel for respondent claims that there being no assignment of errors or statement on appeal, containing the grounds upon which appellants intend to rely, this court can consider no errors that do not appear in the judgment-roll. But defendants not having appealed from the judgment but only from the order denying a new trial, we cannot look into the judgment-roll; if it be correct, therefore, that errors

Opinion of the Court—Lewis, C. J.

ring there cannot be passed upon, the ruling of below would have to be sustained. For the purpose of this case, however, we think a statement containing an assignment of errors is unnecessary, for if the court is to be relieved from considering errors committed at the trial, or determining *whether the evidence was [*508] sufficient to justify the verdict, its right to pass upon the sufficiency of the affidavits used upon the motion for a new trial is undoubted. Where an appeal is taken from an order made on affidavits, no statement is required, and the provisions of the practice act making it the duty of the moving party to prepare a statement containing the grounds upon which he intends to rely on appeal, have no application to an appeal from such an order. Sec. 281 expressly provides that the provisions of those sections "shall not apply to appeals taken from an order made on affidavits, in which such affidavits shall be annexed to the order in which the statement mentioned in those sections." Affidavits used by the moving parties in the court below were properly before this court, and the motion for a new trial, with sufficient assignment of errors to enable it to pass upon the sufficiency. Admitting the propriety of review, the question it is next to be determined whether they make a sufficient showing to entitle the appellants to a new trial. The evidence of Hutchings and Turner is material to the appellants' case will scarcely admit of doubt; but it is not that it is merely cumulative, and consequently not sufficient to authorize a new trial.

Gray swears that he has known the lot in question since the year 1860, that in the spring of that year George May was the plaintiff, and one George May (from whom Gray derived an undivided one-half interest in the premises) in his presence requested of Joseph Clark, the grantor of the premises, the privilege of using the lot in question for the purposes of a hay-yard; that Clark informed them that they might fence it and have the use of it for such rent as they might agree to pay. He also swears that George May stated to him, about two years before the bringing of this case, that Gray was about to commence proceedings to re-

Opinion of the Court—Lewis, C. J.

cover the lot, but that he could not get it, as it belong Joseph Clark. It is also shown by the affidavit of I. S. Turner, that in the early part of the year 1862, Mr. May admitted to him that the property in dispute belong Clark, and that one Robert Morrow was his agent and authority to lease it. These admissions by May were prior to his conveyance to Gray, and are not [*509] independent facts unknown to defendants at the time of trial. Had these admissions been made at the trial, the testimony of other witnesses to the same admissions would be merely cumulative. But that is not cumulative which is in addition to or corroborative of evidence already given at the trial. To render evidence sufficient to overcome this objection, it must be cumulative, not with respect to the main issue between the parties, but upon some collateral or subordinate fact bearing upon that issue. In the case of *Aiken v. Bemis* (3 Woodbury & Minot, 348), Judge Woodbury said: "The meaning of the rule cannot be to exclude cumulative newly discovered evidence of subordinate facts or facts bearing on the general question, for in such case no new trial for new evidence could ever be obtained. New evidence, relating, as it must if it be pertinent to the general ground or general fact put in issue before, must mean that new evidence to a subordinate point or fact, is not competent when that subordinate point, or particular fact, was before gone into; because it is then cumulative, or additional, as to that fact." If the newly discovered evidence brings to light some new fact bearing upon the main question, and it would be likely to change the result, a new trial should be granted. (*Walter v. Gray*, 303; *Parker v. Hardy*, 24 Pick. 246; 3 Gray, New Trials, 1040; *Gardner v. Mitchell*, 6 Pick. 114.) The facts claimed to have been newly discovered are admissions of the plaintiff's grantor, made at a time when the plaintiff claim to have been in possession as tenant in common. There was no testimony introduced upon trial to show these admissions, and one of the defendants swears that they were not discovered until after such a new trial should therefore have been granted.

Judgment reversed.

Opinion of the Court—Lewis, C. J.

THE STATE OF NEVADA, APPELLANT, v. ROBERT
LOGAN, RESPONDENT.

[1 NEVADA, 509.]

JUDGMENT.—An order of the district court quashing an indictment, discharging the defendant and exonerating his bail, is a final judgment from which an appeal may be taken.

REMARKS.—A judgment is final which completely disposes of the [*510] action. To make it final it is not necessary that the rights of the parties should be finally determined, or that it be upon the merits. It is final if it disposes of the particular suit in which it is rendered.

REMARKS—WHEN SHOULD NOT BE QUASHED.—An indictment should not be quashed merely because the grand jury received some illegal or incompetent testimony. If there is *any* legal testimony to sustain it, it should not be set aside.

REMARKS—WHEN MAY BE SET ASIDE.—If there be nothing to support the bill at evidence clearly incompetent and which would not be admissible at the trial, as the testimony of a person rendered incompetent by conviction of an infamous crime, the indictment may be set aside on motion before plea.

REMARKS—TESTIMONY OF GRAND JURORS INADMISSIBLE.—But to authorize the setting aside of an indictment, even where there is no competent evidence to support it, that fact must appear by proof, independent of the testimony of the grand jurors who found the bill, for it is inadmissible for them to show that the indictment was found without testimony or upon insufficient testimony.

—Grand jurors may be called to testify against a witness who is indicted for perjury, to prove what was sworn to before them, or to show that the indictment is not found by the requisite number, but the testimony of a grand juror cannot be received to impeach or affect the findings of his fellows.

APPEAL from the District Court of the Second Judicial District, State of Nevada, Ormsby County, Hon. S. H. HUNT presiding.

The facts appear in the opinion.

For *Appellant*. E. Haydon and Atwater & Flandreau, for Appellant.

For *Respondent*. M. Clarke, for Respondent.

By the Court, LEWIS, C. J. : [*513]

The defendant was indicted by the grand jury of the County of Ormsby for a refusal to pay over certain money

Opinion of the Court—Lewis, C. J.

to the county treasurer which was collected by him as tax collector of that county. Upon the 21st day of March, A. D. 1865, the defendant, by his counsel, moved the court to quash the indictment upon the grounds, as stated in the notice of motion, that it "was found upon illegal and incompetent evidence, which illegal and incompetent evidence was improperly permitted to go before the grand jury, and was improperly heard, considered and acted upon by them."

It is also stated that such illegal and incompetent evidence was the only evidence submitted to said grand jury.

To sustain this motion, one of the grand jurors who found the indictment, and some of the witnesses who testified before them, were called for the purpose of showing what the character of the testimony was, and what certain witnesses testified before them.

The counsel for the people objected to the entire proceeding, which being overruled, one of the grand jurors was examined as to the character of the testimony upon which the indictment was found, from which it appeared that the books of account kept by the treasurer and auditor of Ormsby county were received and acted upon by the grand jury, and also some receipts and other papers, together with the treasurer's account with the defendant. Witnesses were also questioned as to what they testified before the grand jury, all of which was allowed, the entire proceeding apparently being for the purpose of showing that incompetent testimony was received and acted upon by the grand jury in finding the indictment against the defendant. It was not even attempted to be shown that there was not sufficient competent testimony to authorize the finding of the indictment. The court below sustained the motion and entered judgment quashing the indictment and releasing the defendant's bail. Upon these facts four questions are presented to this court for determination:

First. Is the quashing of an indictment and releasing the defendant's bail a final judgment, within the meaning of the criminal practice act authorizing appeals?

Second. Does the admission of incompetent testimony by

Opinion of the Court—Lewis, C. J.

grand jury authorize the setting aside of an indictment on the finding of which such incompetent or illegal testimony was received and considered?

Third. Is it competent for a member of a grand jury to testify as to the character or sufficiency of the testimony before them, upon the finding of an indictment?

Fourth. Was the testimony received by the grand jury, on finding the indictment in this case, incompetent or illegal?

In support of his position on the first question, counsel respondent claims that the order made by the court quashing the indictment and exonerating the defendant's bail, is not a final judgment from which an appeal can be taken. By the 469th section of the criminal practice act, it is provided that an appeal may be taken "to the supreme court from a final judgment of the district court in all criminal cases."

A judgment is final which completely disposes of the action. To make it final it is not necessary that the rights of the parties should be finally determined, or that it be upon the merits. It is final if it disposes of that particular suit in which it is rendered. As stated by the court in the case *Bell v. Davis* (1 Cal. 138), "a judgment of nonsuit other than where the plaintiff submits to a voluntary nonsuit, is a final judgment, even though no costs be awarded against the plaintiff, inasmuch as he is aggrieved by being defeated in his right of action in that suit and his costs in prosecuting it."

In the case of *Weston v. The City Council of Charleston* (Pet. 449), the supreme court, in construing the 25th section of the judiciary act of the United States, which provides that a final judgment or decree in any suit in the highest court of the state, may be re-examined, reversed or affirmed in the supreme court, it was held that the words "final judgment," in that section, must be understood to apply to all judgments or decrees which determine the particular cause, and that it was not requisite that such judgments should finally determine the rights which are litigated.

Opinion of the Court—Lewis, C. J.

[*515] *So it is held by the court of King's Bench in England, that by a final judgment is understood not a final determination of the rights of the parties, but merely of the particular suit. Adopting this signification of the words "final judgment" there can be no doubt as to the character of the judgment rendered by the court in this action. The indictment was quashed, the defendant discharged and his bail exonerated. It was most clearly a final disposition of all proceedings under that indictment, unless the judgment of the court is reversed, and the defendant could only be tried for the offense charged upon the finding of another indictment. It was as complete a determination of the prosecution upon *that* indictment as the verdict of a jury acquitting him could have been; the only difference being that the verdict would protect him from a prosecution for the same offense, whilst the dismissal of the indictment, though final as to all further proceedings under it, would be no protection against a prosecution under another indictment upon the same charge. We, therefore, conclude that the judgment of the court was final, within the meaning of section 469 of the criminal practice act, and the appeal properly taken.

The proposition that if a grand jury receive and consider any but legal proof, the indictment found by them may be quashed, upon that fact being shown to the court, having no authority to support it, and being so manifestly repugnant to the utility of the entire grand jury system, scarcely justifies an extended consideration. It is urged on behalf of defendant that as the law provides that "the grand jury shall receive none but legal evidence, and the best in degree to the exclusion of hearsay or secondary evidence," the admission of hearsay or secondary evidence may be taken advantage of on motion to set aside the indictment under section 275, which declares that it shall be set aside by the court, on the motion of defendant, where it is not found indorsed and presented in the manner prescribed by the criminal practice act. That if any but the best legal evidence is received, the indictment is not *found* in the manner prescribed by the act. The answer to this

Opinion of the Court—Lewis, C. J.

ply is, that the finding of the bill has no reference to the
ence upon which it rests, but only to the fact that
grand *jury finding it must be legally constituted, [*516]
that twelve of their number concurred in the find-

This section merely announces an old rule, which the
rts generally recognize, but which has never been carried
he extent of allowing an investigation of the testimony
n which a bill was found, to ascertain if it was properly
nd. That a grand jury should receive none but legal
of, is an old and well-established rule, but that the ad-
sion of evidence not strictly legal will authorize a set-
; aside of an indictment, is a proposition which seems
ave no authority to sanction it, and, if adopted, would
y be an impediment to the execution of criminal justice,
it is evident that, under the present practice, not one
ictment out of five could be found, where it could not
shown, that some illegal proof was received. As none
t legal evidence can be introduced upon the trial of the
endant, it would be clearly improper to find an indict-
nt where there is not sufficient *legal* evidence to justify a
viction; hence the rule that the grand jury should re-
ve none but legal evidence.

But the reason of the rule will not authorize the setting
le the indictment, merely, because evidence not of the
t legal character is received and considered. If there
nothing to support the bill but evidence clearly incom-
ent, and which would not be admissible at the trial, as
sole testimony of a person rendered incompetent by
viction of an infamous crime, the indictment may be
shed before plea (1 Whart. Crim. Law, sec. 493), but
are there is the slightest legal evidence, the court cannot
uire into its sufficiency, or set it aside, because some
gal evidence was received with it. But to authorize the
ting aside of an indictment even where there was no
evidence at all to sustain it, that fact must appear by
of independent of the testimony of the grand jurors,
it is inadmissible for them to show that an indictment
anted by them was found without testimony, or upon
fficient testimony. (Whart. Crim. Law, secs. 508, 509.)

Opinion of the Court—Lewis, C. J.

This was the rule at common law, and seems to be generally recognized throughout the United States. (*Rex v. Marsh*, 6 Adolphus & Ellis, 236; *State v. McLeod*, 1 Hawks, 341; *State v. Baker*, 2 Miss. 538; *People v. Hulbut*, 4 [517] Denio, 135; **State v. Fassett*, 16 Conn. 457.) In the latter case, Chief Justice Bronson, in delivering the opinion of the court, said: "But the evidence which the defendant proposed to give could amount to nothing less than an impeachment of the grand jurors. They had found a bill charging the defendant with five different offenses, and the substance of the offer was to show that only one offense had been proven before them. It cannot be proper to allow the jurors to be thus assailed. To permit the question to be tried over again in another place, whether the indicting jurors had sufficient evidence or any evidence to warrant their finding, would be contrary to the policy of the law, which, in everything that may affect the jurors themselves, has placed the seal of secrecy upon the proceeding."

The only exception to this general rule seems to be that where a person is indicted for perjury on account of false testimony before a grand jury, the jurors may be called as witnesses to prove what was sworn to before them. So it has been held that they may be called to show that an indictment was not found by the requisite number, though this is in conflict with the common law rule. But to receive the testimony of a grand juror for the purpose of impeaching or affecting the finding of his fellows, is a practice not yet sanctioned by the courts, and it is to be hoped never will be.

Where indictments have been quashed on account of there being no legal evidence to sustain them, it has invariably been in those cases where that fact was shown without calling upon the grand jurors; as, for instance, where the law requires the names of the witnesses examined to be indorsed on the indictment, and the name of but one witness is so indorsed, who is shown to be incompetent by reason of some legal disability.

That is a fact which could be proven without calling upon the grand jurors, and when it is shown to the satisfaction of the court, it would be proper to quash the indictment.

Opinion of the Court—Beatty, J.

But if the practice adopted by the court below were in fact correct, the bill should not have been quashed, for the evidence received by the grand jury, so far as were able to ascertain what it was from the record, was entirely competent, and of the best legal character.

*No better evidence could be obtained than the [*518] defendant's own receipts with the books of accounts kept by the different county officers with him. It is probably the only evidence by which the exact delinquent amount can be ascertained.

Judgment reversed.

IN THE MATTER OF THE ESTATE OF OLAF NICHOLSON.

[1 NEVADA, 518.]

ESTATE OF DECEASED PERSONS—EXPENSES OF ADMINISTRATION.—The percentage allowed by law to administrators, for collecting and disbursing money, is one of the expenses of administration which should be allowed in preference even to funeral expenses.

DEBTS—ATTORNEYS' FEES.—Attorneys' fees may or may not be properly charged among the expenses of administration, according to the particular circumstances of the case.

DEBTS—INSURANCE.—Insurance paid by an administrator on the property of a decedent ought to be allowed as one of the expenses and charges of administration. But if money be paid for insurance under circumstances showing recklessness and want of proper care and prudence, the court may properly refuse to allow it.

APPEAL from the District Court of the First Judicial District, State of Nevada, Storey County, Hon. R. S. MESICK presiding.

The facts are stated in the opinion.

Quint & Hardy, for Appellant.

N. D. Anderson, for Respondent.

*By the Court, BEATTY, J.: [*519]

C. J. Nelson, the administrator on the estate of Olaf Nicholson, filed his account for final settlement, and asked the court to discharge him from further liability. E. W. Keyes,

Opinion of the Court--Beatty, J.

the undertaker who buried the deceased, filed his objections to this account, opposed the discharge, and asked that an order be made on the administrator to pay the funeral expenses. The court made the following order: "The settlement of said estate, as is prayed for by the administrator thereof, is this day refused, and the administrator of the same is ordered to pay the funeral and burial expenses of the said deceased." From this order the administrator appeals. It appears from the appraisement of the estate contained in the transcript that it consisted of a house and lot in Virginia city, appraised at four thousand dollars, and twenty-five shares of mining stock appraised at six hundred and twenty-five dollars. The claims against the estate at the time of intestate's death were: for expenses of last sickness, six hundred and eighty-two dollars and fifty cents; for other debts, ten hundred and fifty-three dollars and sixty-four cents. The account filed shows that the administrator realized one hundred and ninety-eight dollars from rent [*520] of house, six hundred and fifty dollars from sale of house and lot, and thirty dollars by the sale of twenty-five shares of mining stock, say in all eight hundred and seventy-eight dollars. The other side of the account is as follows:

"Expenses of administration."—Here follows a list of items consisting of percentage on the amount of estate, fees to attorneys for estate, clerk's fees, auctioneer's charges, appraiser's fees, etc., amounting in all to five hundred and forty-six dollars and forty-six cents. Then follows, "Cash outlay on the estate by the administrator," followed by a string of items, the first of which is insurance on house, one hundred and fifty-four dollars. The other items under this head consist of items paid for taxes and repairing house, amounting in the aggregate (including the one hundred and fifty-four dollars) to three hundred and forty-three dollars. The next item in account is: "Expenses on mining stock." "To assessments at different times * * * two hundred and twenty-five dollars." After this comes the funeral expenses, amounting to two hundred and seventy-three dollars and twenty-five cents; next, the expenses

Opinion of the Court—Beatty, J.

sickness; and lastly, other debts. Keyes objects to account in many particulars. He objects that the persons on the estate and the amount paid the attorneys have been postponed to and not paid until after the expenses. He objects that the charge of one hundred fifty-four dollars for insuring house is not a proper charge against the estate, and that the administrator cannot be reimbursed from the estate for that charge. He makes the same objection to the item of two hundred eighty-five dollars for expenses on mining stock. We are clearly of the opinion that the percentage allowed for collecting and disbursing of the estate is a proper allowance to be made as one of the expenses of the administration, to be paid in preference to the funeral expenses. An attorney's fees may or may not be a proper charge among the expenses of an administration. If a person employs an attorney to procure his appointment as an administrator, that could not be a charge against the estate. The presumption is, he seeks the appointment because of some expected benefit or advantage to himself. The estate should not be required to pay his attorney than it should pay the attorney of an *unsuccessful applicant for the same [*521] administration. Where one is already administrator, if the estate is involved in litigation, or threatened with litigation, regard to the property claimed for it, it is undoubtedly the duty of the administrator to employ counsel to defend its interests. If the estate has much complicated business to be attended to, when legal advice would be necessary, the court ought undoubtedly to allow an administrator his reasonable disbursements for counsel fees. But it is not incumbent on every administrator to employ an attorney; and where the estate is not involved in any difficulty we do not think it an abuse of discretion in the court to refuse to allow, among the expenses of administration, fees to attorneys whom it was not necessary to employ. We cannot say that it was necessary in this case to employ attorneys to so completely waste an estate between four and five thousand dollars, and not in litigation; as to leave nothing to pay even funeral expenses.

Opinion of the Court--Beatty, J.

The charge for cash paid for insuring house is one which, ordinarily, we should consider a legitimate charge, and there ought to be some very special reason for not allowing such a charge to an administrator; still, there might be such extraordinary circumstances attending the payment of such premium as would justify the district court in not allowing such item. In this case there is something rather extraordinary in the fact that a lot in the heart of Virginia city, with a building on it, appraised at four thousand dollars in February, 1864, should have sold in May, 1865, for only six hundred and fifty dollars. And the court may have been justified in refusing to allow a charge of one hundred and fifty-four dollars for insurance on a house which, with the real estate, could only be sold for so trifling a sum. If the property was only worth six hundred and fifty dollars, it may have been imprudent and reckless to pay one hundred and fifty-four dollars as insurance on a house of no more value than this must have been.

With the light before us, we are not disposed to interfere with the action of the court below. The form of the account would seem to negative the idea that the two hundred and twenty-five dollars for assessments had been paid by the administrator. It is separated from those items [*522] which come *under the heading of "Cash outlay on the estate by the administrator."

If that item has not been paid by the administrator, and he is not personally bound for it, and there is nothing to show either that he has paid it, or is bound to pay it, then this item cannot be allowed before the funeral expenses. If the attorneys' fees, and the amount paid for insurance be deducted from the administrator's disbursements, there will remain in his hands three hundred and ninety-three dollars, and it was proper for the district court to order the funeral expenses to be paid out of this amount.

Before leaving this case we will say, that it has become a reproach to the states west of the Rocky Mountains, that however solvent a man may be whilst living, if he is not very wealthy, the chances are that when he dies his estate will be insolvent. Here is an example of the way in which

Points decided.

es are wasted. A man dies worth some three thousand
rs over and above all his liabilities, and the admin-
tor not only fails to pay a dollar of his existing debts,
claims that he ought not to pay even his funeral ex-
es. There must be something radically wrong in the
gement of estates when such results are produced.
behooves district courts to look narrowly into the man-
ment of estates, and see that they are not thus wasted.
s not been the intention of the court to express any
on against the reasonableness of the attorneys' fee in
ase, for the amount is by no means extravagant, but
r to express the opinion that parties who thrust them-
s into the administration of estates when they are in-
le of properly managing them, should pay their own
neys, and not impose that expense on others.
e judgment of the court below is affirmed.

TE OF NEVADA, RESPOND'T, *v.* REAL DEL MONTE
OLD AND SILVER MINING CO., APPELLANT.

[1 NEVADA, 523.]

—ASSESSMENT OF POSSESSORY CLAIM.—Where the assessor, in making
is assessment, uses the language: "One mine of four thousand four
undred feet, situated on Last Chance Hill," it does not convey the idea
at he was assessing, or attempting to assess, the fee of the land in
hich the mine was situated, but the possessory claim of the miner, and
ght to mine on a certain lode or vein of ore. The meaning of this
anguage is determined by common usage in this country.

—DESCRIPTION OF PROPERTY.—The statute allows district attorneys,
hen bringing suit for delinquent taxes, to give a more particular de-
scription of the delinquent property than that contained in the assess-
ment-roll. When the complaint does not contradict the assessment,
ut merely gives a more particular description, it is proper to admit
timony to show the property described in the assessment-roll and
e complaint are identical.

APPEAL from the District Court of the Ninth Judicial
rict, State of Nevada, Esmeralda County, Hon. S. H.
RE presiding.

Opinion of the Court—Beatty, J.

The facts appear in the opinion.

Quint & Hardy, for Appellant.

William H. Boring, for Respondent.

By the Court, BEATTY, J.:

This was an action brought against the defendant, a mining corporation, to recover the sum of five hundred [*524] dollars, claimed *to be due for taxes on a mine. The court below gave judgment for the plaintiff, and the defendant appeals. Two points are raised by the appellant. First. That the language used by the assessor in assessing the property, indicates that the ultimate right to the property described was assessed, and not the mere possessory claim of the appellant. We think differently. The language used by the assessor, in describing the property assessed, is as follows: "One mine of four thousand four hundred feet, situated on Last Chance Hill." This language, in many parts of the world where the English language is spoken, would appear very indefinite, and convey no fixed idea to the generality of English scholars. The question might be asked: Does it mean a body of mineral containing four thousand four hundred cubic feet—a surface of four thousand four hundred square feet—extending to the center of the earth, or a surface of four thousand four hundred feet square, extending to the center of the earth? Or it might be supposed to mean a half dozen other things. Without a knowledge of the mining laws and customs of this and some of the neighboring States, the description would be perfectly unintelligible. But when we know it is a common and almost universal custom for prospectors in this State to take up claims for mining purposes on the public domain, describing them as so many feet of a certain lode, lead, ledge, or mineral vein, with all its dips, spurs and angles, but giving no lateral boundaries to the claim; and on the other hand, that wherever grants of the public domain are made by the government, the term land is always used in the grant, and it is

Opinion of the Court—Beatty, J.

scribed by metes and bounds; we have not the least difficulty in understanding that the language used by the assessor has reference not to the ultimate right of the appellant the soil in which the mine is situated, but to the possessory claim, which, in miner's parlance, is called "a mine," "mining right," "mining claim," "mining ground," etc. The only question for determination here is: Did the assessor, in fixing the value of this mine, fix it at what, in his opinion, was the value of the full and complete title to the land, or only the value of the possessory title? If the court is satisfied, from the language used, that the latter standard was the one fixed in the mind of the assessor, when he made the assessment, *however awkward his [*525] expression, the assessment must be supposed. If, on the contrary, the assessor fixed the valuation on the fee simple title of the land, it could not stand, because the fee simple land would be worth far more than the mere possessory right. We are satisfied for the reasons stated in this opinion, and those stated by this court in the case of *Hale Norcross G. & S. M. Co. v. Storey County*, that the assessor only meant to assess the possessory right of appellant the mine.

The next alleged error is, that the court erred in permitting evidence to be introduced varying and adding to the language used in the assessment-roll. The assessment-roll described the property as a mine "of four thousand four hundred feet situated on Last Chance Hill."

The complaint describes the property as follows: "Also those certain mining claims situate on Last Chance Hill in said county and known as the "Real del Monte," "Aurora," "Last Chance," "Yellow Jacket," "Pond," "Sunbeam," "Western Summit," "Crockett," "Chihuahua" and "Midnight," containing in all forty-four hundred feet, more or less, and being the same property as described in the assessment-roll of said county for the year 1864. There is no contradiction between these descriptions; there may be many claims in one mine, and where many claims are united and consolidated in the hands of one company there is no impropriety in calling it one mine, or one mining claim.

Points decided.

The description in the assessment-roll was general. The law of 1864-5, p. 163, expressly authorizes the district attorney to give, when he brings suit for delinquent taxes, a more particular description of the property on which the taxes remain unpaid than that used in the assessment-roll. This, the district attorney in this case has done. He alleges, however, that his description embraces the same property as that described in the assessment. We must presume in favor of the judgment in the court below that he established that fact, until it is shown that the description in the complaint embraced ground not included in the assessment. This is not shown.

The judgment is affirmed.

GEORGE L. GIBSON, RESPONDENT, v. D. B. MILNE
ET AL. SAMUEL B. MARTIN, APPELLANT.

[1 NEVADA, 526.]

MORTGAGE—MARKED SATISFIED BY MISTAKE.—When a mortgagee assigns a note and mortgage as collateral security, and subsequently, either by fraud or mistake, has the mortgage marked satisfied on the record, the same will still be treated as a valid and subsisting mortgage in favor of the assignee as against a subsequent mortgagee with notice. In such case the prior mortgage would only be sustained so far as to protect the assignee thereof.

JUDGMENT ON DEMURRER—WHEN NOT A BAR TO ANOTHER ACTION.—An order made by a court which purports first to be a judgment on demurrer to a complaint, and then shows by a comparison of the recitals of the order and what appears in the pleadings of the case that it was founded on facts which accrued after the filing of complaint, and were only made to appear by the answers, and when there was no trial or admission of the truth of these facts by the plaintiff, cannot be held to be a judgment on the merits so as to bar another action.

IDEM — DISMISSAL OF BILL TO ENFORCE VENDOR'S LIEN.—A decree dismissing a bill filed to enforce a vendor's lien, even if that decree was final and a bar to any further proceedings to enforce such a lien, would not be a bar to an action of ejectment by the same party. Nor would it deprive the party of the right to avail himself of the benefits of his legal title when made a party defendant in an equitable proceeding.

CONTRACT—WILL NOT BE ENFORCED UNLESS PURCHASE PRICE IS PAID.—Whether a vendor's lien as such is or is not assignable, neither the party who contracts to sell land nor his vendee or assignee will be compelled to convey the same to the party who contracted to purchase, until the whole of the purchase price is paid.

Opinion of the Court—Beatty, J.

APPEAL from the District Court of the Second Judicial District, State of Nevada, Ormsby County, Hon. S. H. HIGHT presiding.

The facts of this case are fully stated in the opinion.

Thos. E. Haydon and J. J. Williams, for Appellant, Martin.

R. M. Clarke, for Respondent.

By the Court, BEATTY, J.:

[*527]

In this case the plaintiff holds by assignment from T. B. Winston a mortgage on the undivided interest of defendant, Milne, in certain real estate. The defendant, Martin, holds a junior mortgage on the entire interest of Milne & Chedick in the same property. It also appears from the record that Milne bought his interest in the property covered by both mortgages from Elson & Snyder. That he was to pay them a thousand dollars for the interest they sold him in the real estate and certain personal property. That when the payments were made, Elson & Snyder were to make him a deed for the real estate.

Martin has become, by assignment and deed, the holder of Elson & Snyder's claim for the balance of the purchase money, and also the owner of the fee of the land sold or abstracted by Elson & Snyder to D. B. Milne. Plaintiff filed his bill to foreclose his mortgage against Milne's interest in the property therein described. The defendant, Martin, resists the claim of plaintiff, and asks that his claim purchased of Elson & Snyder, and also his mortgage, may be preferred to the claim of plaintiff. He claims that his mortgage should be preferred to that of plaintiff, because his mortgage under which plaintiff claims stands on the record as the mortgage of T. B. Winston, and was marked satisfied and canceled of record by said Winston, and a note made thereof by the secretary of state of Nevada Territory, prior to the time he (Martin) took his mortgage. Whilst the proof shows such to have been the case, it is shown by what appears to have been satisfactory evidence to the referee that Martin had notice when he took his

Opinion of the Court—Beatty, J.

mortgage that the Winston mortgage had been marked satisfied by Winston, after he had assigned the same to Gibson as collateral security. That the marking the same satisfied was either a mistake on the part of Winston, or else a fraud upon the rights of Gibson. *If [*528] Martin had notice of these circumstances (and we are satisfied the evidence fully sustains the finding of the referee on this point), then he certainly cannot claim any priority over this mortgage. The referee was right, we think, in giving priority to Gibson's mortgage over the mortgage of defendant, Martin. But the most particular and circumstantial evidence, showing that Martin had notice of the fact that Gibson held the Winston mortgage as collateral security at the time Winston marked it satisfied, is that of George W. Chedic. He also proves that the note and mortgage were assigned as collateral for only seven hundred dollars. That the note being for twelve hundred and fifty dollars, Milne, after the assignment to Gibson, paid Winston, in lumber, five hundred and fifty dollars, the difference between the amount of the note and the sum for which it had been pledged as collateral, upon receiving which payment Winston canceled the mortgage. Certainly if the sum advanced by Gibson (seven hundred dollars) was to bear no greater interest than the note pledged, it was not improper for Milne to pay the difference between the sum advanced and the face of the note to Winston, and reserve the seven hundred dollars in his hands for Gibson. If such was the transaction, we do not see on what principle it was that the referee allowed judgment in favor of Gibson for the whole twelve hundred and fifty dollars and interest. It appears to us that seven hundred dollars and interest from the date of the assignment was all to which Gibson was entitled. The record purports to contain all the testimony in the case; if there is any testimony contradicting this statement of Chedic's, it has escaped our observation.

The most important point in this case is as to whether Martin is entitled to be paid the amount of claim he purchased from Eisen & Snyder.

Opinion of the Court—Beatty, J.

1. about to introduce his proof on this point, to me and trouble, the plaintiff made the following admissions:

plaintiff then admitted the vendor's liens, set up in defendant's answer, had been purchased by defendant for a consideration from the parties mentioned in defendant's answer; that the amounts thereof were correct; arising from defendants, Chedic & Milne, at the time they were purchased *by defendant Martin [529] from Elson & Snyder, Joseph F. Snyder and A. J. Bailey; that said Elson & Snyder, J. F. Snyder and A. J. Bailey were the original locators and owners of the property; had sold the same in several moieties to defendant Chedic & Milne, upon conditions that at stipulated said Elson & Chedic should pay them stated sums; said sums were so paid, that then said Elson & Snyder, Joseph F. Snyder and A. J. Bailey should execute a deed for said property to said Chedic & Milne, and in case of failure of said Chedic & Milne to make such payment that then said Elson & Snyder, Joseph F. Snyder and A. J. Bailey should re-enter said premises, and said Chedic & Milne should forfeit their right thereto and to the improvements they had made thereon."

The plaintiff admitted defendant Martin had duly executed by deed of said Elson & Snyder, J. F. Snyder and A. J. Bailey, and that the balances set up in defendant's answer were still due from Chedic & Milne to Martin, unless extinguished by an alleged trust which they had in Martin, in favor of Chedic & Milne, or debarred by judgment of the court in the cases of Elson & Snyder, Joseph F. Snyder and A. J. Bailey in this court against Chedic & Milne, this plaintiff, and this defendant, and

In the case of *Gibson v. Chedic et al.*, which was tried before the same referee and in connection with this case, we were posed of the question arising as to the trusteeship of Martin. The only other question then to determine in this branch of the case is, has this claim been barred by former judgment in bar?

Opinion of the Court—Beatty, J.

In August, 1862, Elson & Snyder filed their bill in equity in the district court of the second judicial district of Nevada territory, setting forth that they had sold an interest of an undivided third part in and to the real estate now in controversy, and also certain personal property in and about the sawmill, to D. B. Milne, for five thousand dollars; that when the payments were made as per written contract, then that they were to make a deed to Milne for the property. They charged that Milne had not paid all the purchase-money, but still owed sometwenty-five hundred and seventy dollars, besides interest. They tendered a deed, [*530] asked for a sale of the property to *satisfy their demand, and made various parties who held, or claimed, or were supposed to claim liens on the property, parties to the suit.

Gibson and Martin were the only defendants who appear to have answered. They set up in their answer the very same claims that are now being litigated in this case. Their answers are both in the nature of cross bills, and both ask affirmative relief. Gibson, in his answer, first denies that there is anything due to Elson & Snyder, and avers that their whole contract price for the land was paid and discharged before the filing of their bill. He then sets up his mortgage, and follows this by an allegation that plaintiffs, after the filing of their bill, had assigned all their interest in the subject-matter of controversy to the defendant S. B. Martin, and deeded their interest in the land to him—that the said Martin then had the legal title of the land, etc. Gibson also avers that Chedic & Milne were the owners of the property, long and openly in possession, and he had no notice of vendors' liens when he took the mortgage under which he claims. A number of other immaterial allegations are made, and the answer concludes with the prayer for the sale of the property, and a disposition of the proceeds in accordance with his views of the law of the case.

Martin, in his answer, admits that he had purchased of Elson & Snyder their claim and interest in the land.

By an order of court the case of *Elson & Snyder v. D. B. Milne et al.*, after being consolidated with the cases of

Opinion of the Court—Beatty, J.

Joseph F. Snyder v. G. W. Chedic et al., and *A. J. Bailey v. G. W. Chedic et al.*, was referred to W. H. Brumfield, Esq., to hear and determine the same. Subsequently the court, without setting aside the reference, made the following order: "*Snyder & Elson v. D. B. Milne et al.*, and *J. F. Snyder v. Geo. W. Chedic et al.* The demurrer in the above causes having been submitted at a former day, and it appearing to the court from an examination of the pleadings in said suits that said suits are based upon vendors' liens, that said liens have been transferred to one Samuel B. Martin, who appears as the real plaintiff in said actions, and the court holding that no transfer of such lien can be made, it is, therefore, now ordered that the two suits above named be, and the same are, hereby dismissed at *plaintiff's costs. George Turner, Judge [*531] Second Judicial District Court, N. T."

This is claimed to be a judgment in bar of Martin's right to recover the claim assigned to him by Elson & Snyder. The only demurrers filed in the cases wherein this order is made are the demurrers to the complaints. The complaints do not show that the vendors' liens, as they are termed in this order were assigned. The assignments took place as is shown both by the answer of Gibson and Martin after the complaints were filed.

This order to dismiss the case upon the happening of an event subsequent to the filing of the complaints, an event which is made apparent to the court by the filing of the answers, and not by the allegations of the complaint, is called a judgment on demurrer.

The different demurrers interposed by several defendants were filed in the three suits at dates ranging from August to November, 1862. The answers were filed at dates ranging from May, 1863, to December, 1863. This order was made in January, 1864, apparently without trial, without revocation of the order submitting the case to a referee, and professedly upon demurrers which had apparently been abandoned by the parties filing them, for the same parties who demurred in 1862 answered in 1863. An order thus made cannot be held to be a judgment on the merits which

Opinion of the Court—Beatty, J.

can be pleaded or proved in bar of another action. But admitting it is a judgment of some sort, it only amounts to this: that by the judgment of that court a vendor's lien was not assignable, and therefore a bill to enforce such lien would not be entertained, but was dismissed. The order of dismissal is made especially on this point. This, then, might be held a bar to proceedings by the same parties, or their privies, to enforce a *vendor's* lien as such. But if the plaintiffs in that action had the legal title, and conveyed that title to Martin, would it be any defense to an action of ejectment to say a court of competent jurisdiction in a suit between the same parties had decided that a vendor's lien was not assignable. It appears to us that such a proposition is absurd. Elson & Snyder are admitted in this case to have had what must be considered the legal title [*532] (that is, all the title one can *have in public land); they never parted with that title until they conveyed it to Martin. Martin is in possession under a legal title, and cannot be deprived of that possession until the parties who contracted to purchase of Elson & Snyder or their mortgagees shall have paid the purchase price. The defendant Martin, in his answer in this case, says he purchased of Elson & Snyder their vendor's lien, but other averments in the answer and the admissions of plaintiff that are on record, show clearly what he did purchase, to wit: The fee of the land subject to the contracts for conveyance to Milne when he made certain payments. This is not a vendor's lien in the ordinary sense of that term, and the question does not arise whether such lien is or is not assignable. Nor does it make any difference that a part of the money agreed by Milne to be paid Elson & Snyder was for personality and not for the land. The written contract between the parties shows that Elson and Snyder were not to convey the land until the whole was paid.

A court of chancery will not compel them, or one holding under them, to make a deed or surrender the possession until the whole five thousand dollars and interest is paid.

The decree must be reversed. The court below will decree the sale of the property, and payment out of the pro-

Points decided.

he costs of this suit, and the charges of making next, what is due to Martin as the successor in Elson & Snyder, and to provide for the payment amount, if the sales of the property amount to so much, the court will ascertain the true amount due, that is, whether there is seven hundred dollars or twelve hundred and fifty dollars and in all decree the payment of this next after the claim derived from Elson & Snyder. Fourth, if any left after paying these claims, that it shall be applied on the mortgage executed by Chedic & Martin. Provided, that if there is more than pay half the amount due on the Chedic & Milne only one-half the amount due upon said mortgage be paid out of this fund, and the balance paid to abide the future order of that court.

WILLIAMS ET AL., APPELLANTS, v. B. GLASGOW,
RESPONDENT.

[1 NEVADA, 533.]

SUFFICIENCY OF COMPLAINT FOR MONEY LOANED.—In an action for money loaned, if the complaint charges the indebtedness, the time in which it accrued, the promise to pay and the refusal, it is sufficient.

LEGAL INTEREST.—Interest exceeding ten per cent. per annum cannot be recovered unless the promise to pay it be in writing.

CONSTRUCTION OF LAWS PREVIOUSLY INTERPRETED BY OTHER STATES.—In construing the practice act of California, it must be presumed to have been adopted as interpreted by the highest court of judicature of that state.

REVIEW OF ORDER DISMISSING ATTACHMENT.—Upon an appeal from an order of attachment, this court will review an order of a district court dismissing an attachment, if the appeal is also taken from such order.

ATTACHMENT LAW OF 1861 CONSTRUED.—The attachment law of 1861 was amended by the amendment of 1864-5. The old law remains unimpaired as to debts contracted prior to the amendment, whilst the amendment has application only to liabilities incurred since the 1st day of January, A. D. 1865.

SUFFICIENCY OF AFFIDAVIT.—When an attachment is issued upon a claim for money, prior to the 1st day of April, A. D. 1865, the affidavit is sufficient if it states the claim.

Opinion of the Court—Lewis, C. J.

if it conforms to the requirements of the act of 1861, and need not contain the averments required by the act of 1864-5.

IDEM—PLEA IN ABATEMENT.—If the affidavit be insufficient, it cannot be taken advantage of after plea in abatement. Such a plea is a waiver of all defects in the affidavit.

APPEAL from the District Court of the Sixth Judicial District, State of Nevada, Humboldt County, Hon. E. F. DUNN presiding.

The facts sufficiently appear in the opinion.

Harris & Berry and Quint & Hardy, for Appellants.

M. S. Bonnifield and George A. Nourse, for Respondent.

[*536] *By the Court, LEWIS, C. J.:

The demurrer interposed by the defendant in this cause was improperly sustained. The complaint, though rather inartificially drawn contains all the allegations necessary in an action of assumpsit for money loaned. It is averred that the plaintiffs, at the request of the defendant, loaned him the sum of four hundred dollars, seventy-five dollars of which was paid by the assignment of certain mining stock at the time of the loan; that the defendant undertook and promised to pay the remaining three hundred and twenty-five dollars, with interest thereon at the rate of ten per cent per month, at a certain time specified; that though often requested to pay the same the defendant has neglected and refused so to do, and that there is due to plaintiffs

[*537] from defendant the sum of three hundred *and twenty-five dollars, with interest at the rate of ten per cent. per month. Then follows a lengthy count charging the defendant with having procured the money by means of misrepresentation and fraud, which is mere surplusage, and upon motion might have been stricken out. It does not, however, vitiate the first count, which embodies all the necessary allegations, the indebtedness for money loaned at the defendant's request, the promise to pay, and the refusal to do so. This is all that was required in the *inhibitatus* count for money loaned at common law (1 Chit.

. 341), and is certainly sufficient under the code. Perhaps the complaint should have shown that the promise to pay ten per cent. per month interest was in writing, for if there were not, only ten per cent. per annum can be recovered (Laws of 1861, p. 100, Sec. 4); but the failure to allege that fact is ground only for special demurrer, if for any at all, for the allegation is defective only as to a part of the demand and not as to the entire cause of action. The complaint being sufficient as to the principal sum claimed, the general demurrer should have been overruled. (1 Chit. Pl. 664.) The second point made on the demurrer is that several causes of action are improperly united. Though there is much useless matter in the complaint, the only relief really sought is the recovery of a certain sum of money; and the allegation of fraud and of the assessment and sale of the stock assigned as collateral security is mere surplus matter, and not the statement of another cause of action. No relief independent of the recovery of the sum of three hundred and twenty-five dollars with interest is sought, and indeed the complaint would justify nothing more if it were framed.

The letter of the practice act does not seem to authorize the review of an order dismissing an attachment upon appeal from such an order, and also the final judgment. It cannot be said to be an "intermediate order or decision involving the merits and necessarily affecting the judgment;" and yet with no shadow of authority beyond this the supreme court of California has held that such an order will be reviewed on appeal. (*Reiss v. Brady*, 2 Cal. 132; *Griswold v. Sharpe*, 3 Id. 17; *Tuaffe v. Rosenthal*, 7 Cal. 514.) And in adopting the practice act of that State, it must be [*538] presumed to be adopted as interpreted by the highest court of judicature of that state. In cases other than those settling questions of practice, where decisions are apparently so unauthorized by the statute, we would not be disposed to recognize this rule; but where it is a mere question of practice, it is perhaps the best rule which can be adopted, and one which has, at least, the merit of being generally respected by the courts. Upon this rule and the

Opinion of the Court—Lewis, C. J.

authorities above referred to, this court places its authority to review the action of the court below in dismissing the attachment in this case.

The defendant's motion to discharge the writ was based upon the insufficiency of the affidavit, and the defect complained of, is that it is not alleged therein that the debt claimed is not secured by "lien or pledge upon real or personal property." The statement of this fact is made necessary by the law of 1864 and 1865, which does not, however, apply to this case. The attachment, if allowable at all, could only be issued under the law of 1861. The debt upon which this action is based was incurred before the passage of the law of 1864-5, and that act only applies to contracts made after its passage, leaving the old law unimpaired as to debts incurred prior to the passage of the new act. The act of 1861 is not repealed, but only amended in certain particulars, which amendments have no application to contracts made prior to its adoption. In this action, therefore, which is brought upon a contract made prior to such amendment, the old, and not the new law, should be followed, by which it is only required to be shown that the debt "has not been secured by any mortgage on real or personal property," which was done in this case. In this, as well as all other respects, the affidavit seems to be sufficient. But if the defect complained of really existed, the defendant could not take advantage of it after filing his plea in abatement, because the filing of that plea was a waiver of any defects in the affidavit. (Drake Attach., Sec. 421.) The court, therefore, erred in discharging the attachment, and sustaining the demurer.

Judgment reversed.

Opinion of the Court—Lewis, C. J.

L. B. HARVEY, APPELLANT, v. THE SIDES SILVER MINING COMPANY, RESPONDENT.

[1 NEVADA, 539.]

MEASURE OF DAMAGES FOR INJURY TO PROPERTY.—Where damages are claimed for depositing a large quantity of earth on the premises of plaintiff, and it is shown that the cost of removing it would exceed the value of the premises, it is error to charge the jury that the sum of money which it would take to remove the earth from the plaintiff's lot is the proper measure of damages. But where the cost of repairing the injury does not exceed the value of the property, such cost will usually be the measure of damage.

APPEAL from the District Court of the First Judicial District, State of Nevada, Storey County, Hon. RICHARD RISING presiding.

The facts appear in the opinion of the Court.

Perley & De Long, for Appellant,

Hillyer & Whitman, for Respondent.

*By the Court, LEWIS, C. J.:

[*541]

The facts in this case, as presented to us by the transcript, are substantially as follows: In July, A.D. 1863, the plaintiff purchased a certain lot in the city of Virginia, for the quartz lode claimed by the defendant, from persons claiming to have located it in 1860. Shortly after the conveyance to him he graded about two-thirds of it, and built a dwelling-house thereon at a cost of four thousand five hundred dollars, and inclosed the lot with a fence and stone wall. That the defendant, whilst sinking a shaft upon the ledge, deposited from one thousand to fifteen hundred tons of earth and rock on that part of the lot not graded or improved, broke down the fence and stone wall, and by running water upon the lot destroyed the plaintiff's cellar; by reason of which he suffered an actual damage of about eight hundred and fifty dollars, besides the loss of three weeks' rent of his house, and the use of that portion of the lot upon which the earth is deposited. [*542]

d. The plaintiff claimed five thousand dollars

Opinion of the Court—Lewis, C. J.

damages, and recovered three thousand eight hundred. A motion for new trial having been made by the defendant and granted by the court below, plaintiff appeals.

Upon submitting the case, the judge charged the jury, that the true measure of damage was the sum of money that it would require to remove the dirt from the plaintiff's lot, with a reasonable compensation for injury to buildings and fencing, together with the amount of rent which was lost by reason of the unlawful acts of defendant.

If the jury were misdirected as to the law in this instruction, the new trial was properly granted. Under some circumstances the instruction would perhaps be perfectly correct, though clearly erroneous upon the facts as presented to us in this case. The measure of damage for injury to property is not always the sum of money which it would take to repair the injury, or to restore the property to the condition it occupied before the injury. In those cases where the cost of restoring it to its original condition will exceed its actual value (which may often be the case), the value of the property and not the cost of removing the injury complained of, would be the proper measure of the damage. If the rule announced in the instruction were to be followed in all cases of this character, the damage recovered might often greatly exceed the value of the property appropriated or trespassed upon. In this very case, suppose the plaintiff had no improvements on the lot, and its real value would not exceed one thousand dollars, can it be claimed that the plaintiff would be entitled to recover what it would cost to remove the earth, which would exceed by two thousand dollars the actual value of the entire lot? As it is, had the jury taken the highest cost estimated by the witnesses for removing the dirt, it would have amounted in the aggregate to six thousand dollars, a sum exceeding the entire value of the property, whilst the plaintiff continues in the enjoyment of his dwelling-house and two-thirds of his lot, and which do not appear to have suffered any permanent depreciation from the deposit of earth on the rear of the lot. If the dump pile were a continuing injury, rendering the balance of the lot less valuable,

Points decided.

If the house less convenient, and the cost of removing the dirt would not exceed the damage thus suffered by the plaintiff, it might have been correct to charge the jury that the proper measure of damage would be the cost of such removal; but, on the other hand, if the cost of removing the earth would exceed the damage suffered by the plaintiff, it would be error so to charge them.

Where an injury is done to a building, as in the case of *Waller v. Post* (4 Abb. Pr. 389), cited by counsel for appellant, the cost of putting it in as good condition as it was before the injury would be the proper measure of damage, for in most cases of the kind such cost would, in fact, be the actual damage suffered by the complainant, though where there was a total destruction of a building it was held that the value of the building, and not the cost of rebuilding it, was the proper measure of damage. (*Wylie v. Smithman*, 8 Ire. 236.) So in *Jones v. Gooday* (8 M. & W. 146), the English court of exchequer held that the proper measure of damage in an action of trespass for entering upon the plaintiff's close and carrying away the soil was the value of the land removed, and not the expense of restoring the premises to their original condition.

Though the charge given by the court in this cause might be correct in some cases, it is not the rule where, as in this case, the cost of restoring the property to its original condition might exceed its value or the actual damage sustained by the plaintiff. The new trial was therefore properly granted.

Ordered accordingly.

THE STATE OF NEVADA v. A. P. WATERMAN ET AL.

[1 NEVADA, 543.]

JOINT INDICTMENT—ADMISSIBILITY OF WIFE'S TESTIMONY.—When two parties are jointly indicted but tried separately, the wife of one may be a witness for or against the other, if her husband cannot be benefited or injured by her testimony.

WIFE.—When the wife of an accomplice is called, her testimony is entitled at least to the same weight and effect as that of an accomplice.

INSTRUCTIONS NEED NOT BE REPEATED.—When a judge gives an instruction

Points decided.

to the jury on any point which is clear and intelligible, we do not think he is bound to repeat it in language of counsel, which is substantially the same but less clear, and therefore liable to be misunderstood.

AMBIGUOUS INSTRUCTION.—An instruction to the jury in regard to the effect to be produced by a certain letter alleged to have been written by defendant construed: *Held*, ambiguous.

[*544] **REMARKS OF A JUDGE—WHEN PROPER.**—"The statute which requires the charge or instruction of the court to be in writing, is not violated by the judge telling the jury that he could not instruct them as to matters of fact.

VERDICT—COURT MAY SUGGEST CORRECTION OF.—The court may always suggest to the jury a correction of their verdict as to form.

¹ **ALIBI—EVIDENCE WHEN SUFFICIENT TO ESTABLISH.**—When the defendant attempts to establish an *alibi*, which if established would show the impossibility of his connection with the offense charged, he takes on himself the affirmative of the proof. But it is not necessary he should establish his defense by preponderating evidence. It is sufficient if his evidence is such as to raise a reasonable doubt whether he was present at the place where the offense was committed, or at a different place, and one which was inconsistent with the possibility of his guilt.

² **INSTRUCTIONS NOT APPLICABLE TO THE CASE MAY BE REFUSED.**—When the court refuses to give an instruction containing a correct legal principle and there is nothing in the transcript to show whether it was or was not applicable to the case in which it was asked, we may presume the refusal was on the ground that it was not applicable to the case on trial. The court give an instruction which is wrong in regard to a mere abstract principle, which the record affirmatively shows had no application to the case on trial, this will not be held error.

EVIDENCE DIVIDED INTO THREE CLASSES.—Evidence in regard to its credibility or the degree of conviction which it must produce may be divided into three classes: First—That which establishes a fact beyond all *reasonable doubt*. Second—That which establishes a fact by preponderating evidence. Third—That which only renders it probable that a fact may exist, or, in other words, *reasonably doubtful* if it does not exist.

IDEM SUFFICIENCY OF EVIDENCE FOR DEFENSE.—When a defendant in a criminal case asserts, by way of defense, the existence of any fact which is physically incompatible with his guilt of the crime charged, it is sufficient to entitle him to an acquittal, if his evidence in support of that fact reaches only the third class.

APPEAL from the District Court of the First Judicial District, State of Nevada, Storey County, Hon. RICHARD RISING presiding.

The facts of the case are fully stated in the opinion of the court.

(1) See 5 Nev. 132.

(2) 2 Nev. 227; 5 Nev. 90; 6 Nev. 245; 8 Nev. 392; 9 Nev. 372.

Keyser & Keyser, for Appellant, Waterman.

Williams & Bixler and Attorney-General for Respondent.

the Court, BEATTY, J.:

In this case a joint indictment for robbery was [*547] returned against the appellant and others. Before the trial a *nolle prosequi* was entered as to one of the persons indicted; two of the accomplices (Haynes and Low) were admitted to testify as witnesses for the state, and two of the accused (Waterman and Harris) were put on the jury. The jury brought in a verdict of guilty as to Waterman, and failed to agree as to Harris. Waterman moved for a new trial and in arrest of judgment. Having failed in both motions, and judgment having been rendered against him, he appeals to this court.

The first point made by the appellant is, that [*548] the grand jury which found the indictment was not properly drawn, and was composed of persons not qualified to sit as jurors, because they had not paid their poll-taxes and registered their names as voters. We see no irregularity in the mode of drawing, and we have decided in the case of the *State v. Salge* that it was not necessary that a person should have paid his poll-tax and registered his name as a voter prior to last October to qualify him for jury duty. The second point, and one upon which counsel seem to rely with much confidence, is that the court below erred in admitting Mary Haynes, wife of an accomplice in the robbery, to testify against appellant.

Counsel cite three authorities to sustain their position. The first case cited is *Rex v. Neal et al.* (7 Car. & P.) This does not sustain the position of counsel. We do not understand the court there as deciding absolutely that the wife of the accomplice was incompetent to testify, but that if she did testify, that the court would under the circumstances of that case consider her testimony as no better than that of an accomplice; and if no other evidence could be had to corroborate the testimony of the accomplice, would send the jury to acquit. Some of the expressions of Green-

Opinion of the Court—Beatty, J.

leaf (another authority referred to) are general and comprehensive enough to sustain the position of counsel; yet from the concluding sentence, in section 335, it is evident to our minds Mr. Greenleaf was of opinion that in just such a case as this the testimony of a wife of an accomplice might be heard.

The same observations would apply to some general remarks made by Mr. Wharton on his work on criminal law, to be found in sections 767 and 769 of that work. But these general propositions are qualified by other sections. In section 768 Wharton uses this language: "H. D. S. Z. and T. were jointly indicted for murder, and a separate trial awarded to T. Upon the trial of T. he offered to prove an *alibi* by the wives of H. and S. It was held that they were competent witnesses. The court, after reviewing the authorities upon the question say: 'The mere fact that the

husband is a party to the record does not of itself [*549] exclude the wife as a *witness on behalf of other parties, but the rule of exclusion is only to be applied to cases in which the interest of the husband is to be affected by the testimony of the wife.'"

This quotation, we think, contains the true rule. When the husband is jointly indicted with others the wife cannot testify if the effect of her testimony is to injure or benefit her husband. But when her husband can derive no benefit nor receive any detriment from her testimony, we see no objection to her testifying. We cannot conceive in this case how the testimony was to benefit or injure her husband. Our statute forbids the conviction of any one on the testimony of an accomplice without corroborating testimony. The court instructed the jury in effect that the evidence of Mrs. Haynes was not to be received in corroboration of her husband's testimony, to justify conviction without other corroborating testimony. With this instruction certainly the prisoner has no right to complain. Her testimony was only allowed to have the weight and effect that is given to the testimony of an accomplice. We think there was no doubt she was competent to testify, and her testimony was at least entitled to this degree of weight and efficacy.

Opinion of the Court—Beatty, J.

The next error complained of is that the court did not give certain instructions in the precise language in which they were asked. The facts appear to be that the defendant asked certain instructions to the court. None of them were read in the hearing of the jury until the court had examined them. The judge marked certain of the instructions "given in substance," and read those so marked to the jury. Upon one instruction he marked "not given;" upon some five others he marked "given in substance." These last, it would appear, were not read to the jury, but a reference to the written charge of the judge shows that they were all "given in substance" in his general charge. The charge contains not the substance but almost the same language contained in the instructions, with the exception of the correction of some grammatical and verbal inaccuracies in the instructions asked. We think when a judge gives a charge on any particular point in clear, intelligible and correct language, it is no error to refuse to repeat it in language which, from being incorrect, ungrammatical, or not sufficiently guarded and restricted in its terms, is liable to be misunderstood by the jury. The next error assigned is that [*550] the court erred in giving instructions to the jury in substance to the effect to be produced by a certain letter alleged to have been written by the defendant, in case they should find that he did write it. The entire charge on this point is as follows: "From all the testimony in the case upon the question you will determine whether the letter purporting to have been written by Waterman to Low is genuine or not, the defendant Waterman having attacked it as not being genuine. If you should find that the letter is genuine, this is evidence which you should duly consider as corroborating the statements of the accomplices against the defendant Waterman, tending to connect him with the commission of the alleged offense. But this letter of itself should not be considered as tending to corroborate the statement of Low and Laynes as to the defendant Harris." We think there is no language in this part of the charge that might have been more guarded, yet we are hardly prepared to say there is error in the charge. As we understand it, it was rather

Opinion of the Court—Beatty, J.

advice to the jury to weigh and consider that letter, and determine what weight and effect it should have, if any, in corroborating the testimony of accomplices against Waterman, than instruction that it should have weight and effect for that purpose. The language in this instance is ambiguous, and it would be well if the case is retried, to correct that ambiguity.

During the time the jury were out consulting as to a verdict, they came in and propounded some question to the presiding judge, in writing. He informed them the question they asked was one relating to facts of which they were the judges, and he could give them no instructions on the subject. It is complained that this is a violation of the statute which requires the judge's charge in felonies to be in writing. We think this was not a violation of the spirit or intention of the statute. It was not the intention of the statute to prevent the judge addressing any remark to the jury, but only to reduce to writing those instructions in regard to the legal propositions involved in the case, as which might be the subject of review in this court. Probably in almost every trial of a felony case the judge addresses some words to the jury, which are in some respects to be regarded as instructions, yet such [*551] conduct of the judge is not held to be error.

A very common method is for a judge to tell the jury he will read the definition of the offense charged from the statutes, and then read what the statute says in defining the offense. Here the preliminary information or charge is given orally, but the body and substance read from the statutes. We are not aware this has ever been claimed to be error. Certainly this would be full as objectionable as telling the jury he could not charge them on a certain point. (See 9 Nev. 121.)

It is also claimed that the verdict rendered in this case is not the verdict of the jury, because when the foreman first handed in his verdict the court examined it and suggested that it was not exactly formal, and on that suggestion the foreman corrected it, handed it to the clerk, and it was recorded as corrected. After being recorded it was read to

Opinion of the Court—Beatty, J.

the jury, and being asked if it was their verdict, they all assented to it. The verdict as originally written read as follows:

"The State of Nevada v. A. P. Waterman.—We, the undersigned, jurors in the above case, find a verdict of guilty, as charged in the indictment.

"J. H. TILTON, Foreman."

As corrected, it reads as follows:

"First District Court—*The State of Nevada v. A. P. Waterman and C. A. Harris.* We, the undersigned, jurors in the above case, find a verdict of guilty, as charged in the indictment against A. P. Waterman.

"J. H. TILTON, Foreman."

We think there is nothing in this point, because both verdicts mean the same thing, and it is always competent for the court to suggest the correction of a verdict in mere matter of form. Even if there had been a substantial difference between the two verdicts, we cannot see what objection could be raised to the latter verdict after all the jury assented to it. The last point we shall notice is, that in regard to an instruction given, and one refused, as to how far the defendant was to have the benefit of any doubt in the minds of the jury in relation *to [*552] his guilt or complicity in the robbery charged.

The defendant Waterman asked for the following instruction, which was refused: "If all the circumstances shown in the case leave it reasonably uncertain whether Waterman was in Virginia when the robbery was committed, the jury must acquit him." We extract from the general charge the following sentences which bear on this point:

"If from the evidence there is a reasonable doubt remaining in your minds as to the guilt of the defendants, or either of them, he or they must have the benefit of that doubt and acquit. A reasonable doubt is such a one that would influence or control you in your ordinary affairs and business transactions. You would not be justified in con-

Opinion of the Court—Beatty, J.

victing the defendants, or either of them, if the evidence goes no further than to establish a probability of their guilt, but you must find that the evidence establishes the truth of the facts charged in the indictment, to a reasonable and moral certainty, a certainty that carries and directs the understanding and satisfies your reason and judgment." "If, in reviewing all the testimony introduced on the part of the state, you are satisfied of the guilt of the defendants, under the rules given you by the court, you will then consider the defenses set up by the defendants, and in considering that of *alibi*, you will bear in mind that it devolves upon the party urging it to establish the same to your satisfaction by evidence."

"It is not sufficient to warrant an acquittal that he merely raises a reasonable doubt as to whether the *alibi* is established, but, as before stated, you must be satisfied of its truth by testimony." "If you believe from the testimony that the defendant, Waterman, * * * at the time alleged, was in the city of Virginia, you must acquit him." It is to be observed that the *alibi* attempted to be set up by the defendant was that he was in the city of Virginia at the very identical time the robbery was alleged to have been committed at a point several miles distant in the country, and it was not pretended Waterman was connected with the robbery in any other way than being in the country and assisting at the very point where the robbery was done. The charge of the judge, as given, indicates that it [*553] was the opinion of the court that *the jury should acquit if they had a reasonable doubt of the guilt of the prisoner, and that doubt arose from any other consideration than the impression made on their minds by the proof as to an *alibi*. But if such a doubt arose from the evidence of the prisoner introduced to prove an *alibi*, then he was not to have the benefit of that doubt. Whilst the language of the instruction is not as clear on this proposition as it might have been, the refusal of the court to give the instruction asked by defendant on this point clearly shows such was the theory of the court. Such is the theory assumed by the counsel for the state in this court, and no

Opinion of the Court—Bentley, J.

But it was argued to the jury on that theory, and if that not the correct theory, the prisoner was entitled to the instruction he asked. The instruction was not refused on ground that the defendant Waterman might have been guilty of some connection with the robbery, without being present at the place where it took place, because the court instructs the jury that if he was in Virginia when the robbery was committed, they must acquit. To state the proposition more nearly in the language of counsel, it is this: that when the defendant set up the "plea of *alibi*," the burden of proof was cast on him by the law, "and that he did not comply with the rule requiring him to establish the fact by merely raising a doubt as to whether he had done so." The case, as presented to the jury on this theory, must assume one or the other of these dilemmas—either the jury are instructed that if they have a reasonable doubt as to the guilt or innocence of the defendant, they must acquit, and at the same time are told that if they have a reasonable doubt as to whether the prisoner was present at the robbery, aiding and assisting therein, as was attempted to be shown by the prosecution, or was at the time of the robbery at another place and entirely disconnected with the robbery, there was no ground at all for acquittal. Or else, on the other hand, the instructions and theory on which the case was submitted to the jury must be understood to have been this: If you have a reasonable doubt as to the guilt or innocence of the prisoner, and that doubt arises from a consideration of the evidence in the case other than that in regard to the attempted proof of an *alibi*, you must give him the *benefit of that doubt and acquit. But [*554] your doubt of his guilt or innocence only arises from the consideration of the evidence he has introduced, tending to prove an *alibi*, he is not entitled to the benefit of that doubt. In such case there must be such a preponderance of evidence as to *satisfy* you (not merely to raise a reasonable doubt on that point) that when the robbery was committed he was in Virginia city, and therefore not connected or not shown to be connected with the robbery. The need be said on the first branch of this dilemma. The

Opinion of the Court—Beatty, J.

whole proof introduced by the state went to show that the defendant was present at the robbery. There was none to show, as we are bound to infer from that part of the evidence contained in the record and the instruction of the court, that he was connected with the robbery in any other way than by his actual presence. None to show that he had aided and abetted in planning the robbery, to be executed by others. If then they doubted whether he was present at the robbery, how could they fail to doubt whether he was guilty or innocent? Such a position is too absurd for any sane man to assume. It would be equivalent to the jurors saying: We have grave doubts whether Waterman was present, or had anything to do with the robbery, but we are satisfied he is guilty.

Let us see if the other horn of the dilemma presents such a case as can be sustained on reason or authority. Counsel for the state refers to many authorities to show that when one man kills another, especially if the killing is intentional, the burden of proof to justify or extenuate the killing is thrown on the defendant, and argues that if a defendant indicted for murder must assume the burden of proof and show satisfactorily the killing was justifiable, excusable, or under circumstances which would extenuate his offense, that the same rule would apply when the prisoner attempts to prove an *alibi*. We can see no analogy in the two cases.

When one man intentionally kills another, and the slayer is not a civil or military officer, soldier, sailor or marine, acting in the discharge of his duty, the law presumes malice, and consequently that the killing is murder. That legal presumption must be rebutted by sufficient evidence to release the *defendant from the penalty imposed for murder. But when a robbery is committed the law does not presume that a prisoner indicted for that robbery was or was not at any particular place.

There is no presumption as to the locality of the party indicted, unless you can say the legal presumption of the prisoner's innocence involves the presumption that he was not at the place where the offense was committed. Certainly, there is no presumption that he was not at any other

Opinion of the Court—Beatty, J.

a place. Then the prisoner, in attempting to establish *alibi*, certainly has no legal presumption to overcome, the authorities cited as to presumption in cases of homicide have no application. It is said that where a prisoner attempts to prove an *alibi*, he has the affirmative, the burden of proof lies on him, and he must make that proof satisfactory to the minds of the jury. It cannot be denied in such case the prisoner has the affirmative and burden of proof. If one be indicted for committing an offense at Carson, it is not sufficient for him to say "I was at Virginia when the offense was committed," and call on the jury to prove he was not there, but he must take the affirmative of the case and prove he was at Virginia. But we do not conceive how the fact that defendant is to assume the affirmative and take the burden of proof on himself, affects the question as to the degree of conviction that proof must produce on the minds of the jury to justify them in a verdict of not guilty. The humanity of the law provides that where there is a reasonable doubt of the guilt or innocence of the accused, he shall be entitled to an acquittal. What possible process of reasoning can one arrive at the conclusion that it makes any difference whether that doubt is raised in the minds of the jury by the proof of one fact or another. When the state proves that at a certain time a prisoner was at one spot committing a certain crime, he avers that at the same moment he was at an entirely different place, it is but an indirect mode of showing the evidence of the state was false. The witnesses on one side or the other are either mistaken or perjured. If the jury are puzzled in their mind as to what set of witnesses are perjured or mistaken, shall they find a verdict of guilty? Such a proposition would shock the sense of justice of any reflecting mind. Let us suppose a case: A stage is stopped by a robber, and the passengers robbed. A. [*556] is indicted for the robbery. Several passengers are sworn and say that A. looks exactly like the man who robbed them, but they have since seen B. who looks exactly like A., and they cannot pretend to say whether it was A. or B. who robbed the stage. Another passenger is called,

Opinion of the Court—Beatty, J.

who says: I know it was A.; A. has a scar over his right eye, and B. one over his left; I was acquainted with A. and B. before the robbery was committed; I knew they could only be distinguished one from the other by the fact that A. had a scar over the right eye, and B. over the left; I looked at the scar and am positive it was over the right eye, and A. was the man who committed the robbery. Here the state closes its case. A. introduces another one of the passengers on his behalf, who says: I, too, was acquainted with A. and B. before the robbery; I was aware they could only be distinguished by the scars over their eyes; I looked at the scar and am positive the scar was over the left eye; B. was the man who committed the robbery; A. was not there. If the witnesses were equally respectable and intelligent here is an exact balance of testimony. The state having made out a clear *prima facie* case, and the prisoner not being able, when he takes the affirmative, to produce preponderance of testimony in his favor, must be convicted upon the theory established in this case. The state could then turn round and convict B. on the same testimony, only substituting the witness who testified in favor of A. in the room of the one who testified for the state in the former trial. Two parties would thus be punished for the same offense, when it was evident that only one was guilty. Any rule leading to such a result must be erroneous. Yet there is no difference in principle between proving an *alibi* and proving a mistake as to identity. In each case the defendant must assume the affirmative. The only thing we find in the books at all tending to support the position taken by counsel for the state is a loose expression of Chief Justice Shaw, in the charge he gave to the jury in the case of the *Commonwealth v. Webster*. The chief justice says:

“In the ordinary case of an *alibi*, when a party charged with a crime attempts to prove he was in another place at the time, all the evidence tending to prove that he [*557] committed the *offense, tends in the same degree to prove he was at the place when it was committed. If, therefore, the proof of the *alibi* does not outweigh the proof that he was at the place when the offense was committed, it is not sufficient.”

Opinion of the Court—Beatty, J.

at he was not then speaking of the degree of doubt or uncertainty which was to be produced on the minds of the jury. He was only speaking of the manner in which convictory evidence should be weighed and balanced in their minds. The language used by the same judge in another part of the charge shows to our mind that he required any proof in regard to an *alibi*, or any similar defense which would produce *reasonable doubt* in the minds of the jury, would entitle the prisoner to an acquittal. The learned chief justice says: "We now come to consider that part of the defense on the part of defendant which has been designated not perhaps with precise legal accuracy, and which is, that the deceased was seen elsewhere, out of the medical college, after the time, when, by the theory of the law on the part of the prosecution, he is supposed to have spent his life at the medical college. It is like the case of an alibi in this respect, that it proposes to prove a fact which is repugnant to and inconsistent with the facts constituting the evidence on the other side, so as to control the conclusion, or at least render it doubtful, and thus lay the ground for an acquittal."

The rule of law and of common sense is, that where there is a reasonable doubt as to whether a prisoner has committed the act or offense with which he stands charged, he must be acquitted whether that doubt arises from a defect in the evidence introduced by the state or from the evidence introduced in rebuttal by the defendant. We speak, of course, in this case, of doubts as to the commission of an act, not of doubts as to intention or motive in cases of homicide which, as we have shown, stand on a different footing. The charge given by the court on this subject was not clear and satisfactory. It was certainly capable of a construction prejudicial to the rights of the prisoner. And it is beyond question that if we are right in our conclusions as to the facts of the case, that defendant was entitled to have the proper instruction which he asked for given to the jury.

After the opinion in this case had been nearly prepared [*558] and, the attorney-general filed a brief raising a question which had not been made by the counsel who argued

Opinion of the Court—Beatty, J.

the cause, and who filed the original brief on behalf of the state. The new point raised by the attorney-general is, that this court ought not to reverse a case, because the court below may have erred in a mere abstract proposition laid down in the instructions *given*, if that proposition has no practical bearing on the case. And that when an instruction is given by the court, and there is no bill of exceptions showing or referring to the evidence on which that instruction is based, this court is not to presume that there was such evidence, but to presume in favor of the correctness of the judgment, and consequently to presume that this instruction was a mere abstract proposition, having no reference to the evidence in the case, and therefore perfectly immaterial. We suppose in the absence of any bill of exceptions stating what the evidence in the case was, that the refusal of a judge to give an instruction about a legal proposition which might or might not be involved in the trial of such a case as was before the court, would not be error. Because we would suppose the instruction might have been refused because there was no evidence to make it applicable to the case. So, too, if it appears affirmatively from the record that the court has given a wrong instruction about a mere abstract principle of law, which had no application to the case on trial, this will not be such error as to reverse the judgment. (See *Shorter v. People*, 2 Coms. 193.)

But we think it would pushing presumptions in favor of the judgment rather too far to presume, in order to support the judgment, that instructions given by the court on its own motion (not at request of counsel on either side) were mere abstract propositions, having no connection with the case on trial. But, without determining this general proposition, let us see what were the facts of this case as connected with the instructions on the subject of *alibi*. Defendant Waterman was indicted for robbing a stage. The little testimony in the record shows the robbery was committed on the road from Carson to Virginia. The judge, in the instruction given by himself on his own motion, tells [*559] the jury, after weighing the *testimony given by the state "they will then consider the defenses set up

Opinion of the Court—Beatty, J

the defendants, and in considering that of *alibi*, you," etc. Again he refuses to give the instruction asked the defendant Waterman, as to there being a reasonable doubt of his having been in Virginia when the robbery was committed, but, on his own motion, gives one to the effect that if they believe (a reasonable doubt on this subject was enough) Waterman was in Virginia at the time the robbery was committed, they must acquit. These instructions, other with the endorsement of the judge thereon, are, by mistake, made a part of the record without being included in the bill of exceptions. Do not the instructions given, the action of the court in refusing to give No. 10, asked Waterman, carry conviction to the mind, beyond a reasonable doubt, that there was proof introduced by Waterman tending to show that he was in Virginia city when the robbery was committed, and not at the place where it was committed?

To suppose otherwise would be not to suppose merely that the judge made a grave error in giving instructions about a matter not involved in the case before him, but we must presume he acted in a manner almost indicative of insanity.

We indulge no such presumptions. We think the record affirmatively shows that one of the defenses attempted by the defendant Waterman was to prove an *alibi*. That it was not shown in the most regular manner, it must be admitted. The defendant's counsel should by some direct statement in a bill of exceptions, or reference to evidence in the bill, have shown that this defense was attempted to be established by competent testimony. But an oversight of this kind by counsel ought not to prejudice a defendant, where it is evident an error has been committed prejudicial to his rights.

The judgment of the court below must be reversed and a new trial granted, and it is so ordered.

RESPONSE TO PETITION FOR REHEARING.

By the Court, BEATTY, J.:

The counsel for respondent in this case commences his petition by a statement that it is the general impression of the bar that the opinions of this court, like the law [*560] of the Medes and *Persians, are unchangeable, and, therefore, he has but little hopes of success, but will, nevertheless, attempt in plain and unmistakable but respectful language to point out the errors which, in his opinion, the court has fallen into.

We will say for the benefit of the gentleman and the bar at large, that the business before the court has not been great. That we have had ample time to examine thoroughly all cases submitted to us. We have never failed to examine every authority cited that conflicted, or seemed to conflict, with our views of any case under advisement. We have not only done that, but we have generally examined many more authorities than were cited. Having given a thorough examination to all cases submitted to us, we have not often deemed it necessary to grant rehearings.

Whilst we cannot grant rehearings merely because counsel differ with us in opinion, we certainly shall not take exception to the course of counsel in any fair argument or refutation of the views of the court.

Counsel complain that the opinion of the court does them injustice in two particulars:

First. In stating that they did not make a point subsequently urged by the attorney-general.

Second. In misstating their theory as to certain point in the case.

With regard to the first point, perhaps it would have been more correct to have said that the point presented by the attorney-general was not *particularly* urged by counsel who argued the cause. It is true, as counsel state, that in the third point of their brief they lay down the general proposition that error must be affirmatively shown, and when the whole of the evidence does not purport to be given in the

Opinion of the Court--Beatty, J.

st, only those instructions will be held erroneous could not, under any circumstances, be otherwise erroneous and tending to prejudice the defendant.

a general assignment of error, would be sufficient the point discussed by the attorney-general.

here was no attempt, as far as we recollect, in the argument, and certainly none in the brief, to apply the principle to this particular point.

as not claimed, so far as we are aware, that [*561] record did not show that this was a case in which it was proper that instruction should be given as to the method of proving an *alibi*.

It was urged, both in the brief and oral argument, that the instructions on the subject of *alibi* were perfectly

correct. This position was never once taken by the original respondents, so far as we are aware, that it was immaterial whether those instructions contained the law or not, or the cause of the absence of evidence showing their inability to this case. It was only the attorney-general who suggested and attempted to sustain this proposition.

Let us assure counsel that we did not and do not desire to cast any reflection on them in this or any other respect.

Can we conceive how the fact that the court mentions that it did not take an untenable position could be construed as a reflection on the care or ability of counsel. Had the court held the point well taken, then indeed the opinion of the court might to some extent have been considered as a vindication on their part. This court is rather disposed to commend the discretion of counsel in not taking untenable positions.

As regards the second point complained of by counsel, we will say that we first stated what we supposed their proposition to be. We stated the theory in a manner that was rational, though not law.

As we are not perfectly certain that we did state the proposition as they wished to be understood, we then stated the proposition in the very language of the brief. If the proposition was misunderstood, there was their own fault, and we are sorry to have to say that we are sorry to correct us.

Opinion of the Court—Beatty, J.

They have written a long argument on petition for rearing, and after reading it over a number of times carefully feel unwilling to state what are the legal propositions contained in the petition lest we should inadvertently do ourselves injustice.

We will not attempt to answer that which is to us somewhat obscure, but if possible we will put our own view in language that cannot be misunderstood, only referring to a few portions of the petition which can help to elucidate our ideas.

[*562] *In deciding as to the propriety of the instructions in regard to the effect of proving an *alibi*, we assumed that there was no proof offered to the jury that Waterman was connected with the transaction in any other way than by his presence at the actual scene of the robbery. In our original opinion we pointed out the reasons why we assumed that to be the fact. We think these reasons need not be repeated.

Taking it for granted, then, that the proof against Waterman did tend to prove that he was actually present at the robbery, aiding and assisting therein, but did not tend to show that he was otherwise connected therewith, let us examine the instructions given and refused. Under this state of facts then the court gave this instruction :

“If in reviewing all the testimony introduced on the part of the state, you are satisfied of the guilt or innocence of the defendants under the rules given you by the court, you must then consider the defenses set up by the defendants. In considering that of alibi you will bear in mind that it involves upon the party urging it to establish the same to your satisfaction by evidence. It is not sufficient to raise an acquittal that he merely raises a reasonable doubt whether the alibi is established ; but, as before stated, you must be satisfied of its truth by testimony. If you believe from the testimony that the defendant Waterman at the time alleged was in the city of Virginia, you must acquit him.”

We have italicised part of the instruction to call attention to it. If the instruction means anything which is

Opinion of the Court—Beatty, J.

lutely nonsense, it means this: "You will first consider the evidence of the state, and if that, standing alone, induces on your minds a conviction beyond all reasonable doubt of the guilt of the prisoner, you will then consider evidence given by defendants, and in considering that which tends to prove an *alibi*, you must bear in mind that it is not sufficient for the defendants, or either of them, to produce on your minds a reasonable doubt as to whether they were present at the place of robbery, or were at a totally different place when the felony was committed. If a reasonable doubt on this subject is not sufficient, there must be a preponderance of evidence tending to establish an *alibi*. In other words, the evidence which the prisoner introduces, tending to show he was in [§563] Virginia or Carson, as the case may be, at the time the offense was committed, must be *stronger and less susceptible of doubt* than that introduced by the state to show they were not at those cities when the offense was committed, or at a point between the two, where the stage was held."

If it does not mean this, then it means that the jury may believe from the testimony of the state that the prisoners were, beyond a doubt, at the place of robbery at a certain time, and may also believe from the testimony of the defendants that *probably* at the very same moment of time they were at a totally different place. In other words, in order to convict Waterman you may believe that he could be corporally present at two different places at the same time. This, it appears to us, is utter nonsense.

The instruction refused was this: "If all the circumstances shown in the case leave it reasonably uncertain whether Waterman was in *Virginia* when the robbery was committed, the jury must acquit."

The petition says, when reduced to plain English, this means: "The defendant Waterman *alleges* that at the time of the commission of the robbery he was in *Virginia*. He has made sufficient proof to make it *reasonably uncertain* whether he was in *Virginia* when the robbery was committed, the jury must acquit."

Opinion of the Court—Beatty, J.

We admit the language used by petitioners is equivalent to that of the instruction refused. But, say the counsel, if the instruction had been in this form it would have been erroneous to refuse it. "If all the circumstances shown in the case leave it reasonably uncertain whether Waterman *was at the place* of robbery when it was committed." Now we cannot see the difference between the two. If it was reasonably uncertain whether he was or was not in Virginia it certainly must have been at least equally uncertain whether he was at another place at one and the same time. For according to the laws of nature a man cannot be at two places simultaneously.

Suppose the case had been tried where special verdicts are allowed in criminal cases, and the verdict had been in this form:

[*564] "We, the jury, are unanimously of the opinion that the defendant Waterman was, beyond all reasonable doubt, present at a point about ten miles south of Virginia on the night of the 21st of May, 1865, when the stage was robbed, and was then aiding and assisting in the robbery as charged in the indictment, and we find the facts so to be. We come to this conclusion from the clear and satisfactory evidence of the prosecution."

"On the other hand, the prisoner introduced evidence almost as clear, satisfactory and convincing that he was at Virginia, ten miles from the scene of the robbery, when it occurred. There is a very slight shade of difference between the strength of the evidence proving that he was at the robbery, and that proving he was at Virginia, though there is a slight balance in favor of the former proposition."

"Whilst, therefore, the proof of an *alibi* is very clear, strong and free from all suspicion of fraud, deception, or trick, we cannot say there is a preponderance of testimony proving this defense, unless we may indulge in the theory of a party being at two places at the same time. We find as a fact the defendant has established his alleged *alibi* by clear, satisfactory, unimpeached and unsuspected, *but not preponderating*, testimony. With this explanation, we leave it to the court to determine whether the prisoner should be sentenced."

Would any judge pass sentence on a prisoner under such finding? If so, we think he would have very little idea of the humanity of the law.

Counsel for respondent, in their petition, lay down these three propositions as containing the gist of their whole case:

"First. That when the defendant alleges an *alibi*, the burden is cast upon him to prove it—a proposition clearly admitted by this court in its opinion, and established by the authorities cited in our original brief.

"Second. That a fact which the defendant must prove, must be established satisfactorily by a preponderance of testimony; to which we again cite all the authorities mentioned by us.

"Third. That the *fact* so to be established is not *proven* by testimony only sufficient to raise a *doubt* whether such *fact* does exist; to which we also cite the same authorities, and *beg to add that the reverse of the proposition [*565] would place one in the ludicrous position of saying that you must *not prove* a proposition which you *must prove*."

Let us endeavor to answer these propositions. Proof in civil or criminal cases never amounts to mathematical demonstration. What we call proof is usually documentary evidence or the oral testimony of witnesses, directly declaring certain things which are material to the issue on trial to exist, or to have transpired, or else declaring other things not material in themselves to exist, or to have transpired, from which the judge or jury may reasonably infer that the material facts do exist or did transpire.

If ten of the most respectable men in any community were to swear positively that they saw A. B. at a certain place at a certain time, it might not be true that A. B. was there.

There might have been a mistake as to identity, or some other mistake. Then, in speaking of proofs in judicial trials, let it be understood that positive, unmistakable proof never meant.

Practically, proof may be divided into three classes with regard to its strength or the force of conviction it produces in the tribunal before which it is introduced.

Opinion of the Court—Beatty, J.

First. That which establishes a fact beyond all *reasonable doubt*, but not to an absolute mathematical certainty.

Second. That which establishes a fact by preponderance of evidence. In other words, render it more probable that the fact does exist than it does not.

Third. That evidence which renders it *probable* that a fact *may exist*, or, in other words, render it *reasonably doubtful* if it does not exist, but still does not prove the fact by a preponderance of evidence.

It is a rule of law that in criminal cases the defendant can only be convicted by evidence of the first class, with this exception to the general rule: Whenever the prosecution establishes a voluntary killing on a trial for murder by proof of the first class, the law presumes malice and dispenses with all proof thereof by the prosecution.

If the defendant attempts to rebut this legal presumption, courts have generally held that it is not sufficient to [*566] raise a *doubt as to whether the defendant was actuated by malice or an excusable motive in taking life.

But there must be a preponderance of evidence in favor of defendant on this point. He must establish his defense by evidence of the second class, as it regards strength of force of conviction which it produces.

In other words, the body of the crime, the *corpus delicti* as the lawyers call it, must be established by testimony of the first class.

The motive of the act may be established in the absence of proof, by a presumption of law. Or, if proof be introduced on the subject *pro* and *con*, the defendant must suffer unless his proof is reasonably adequate to show an excusable motive, and stronger than the prosecution to prove malice.

The defendant must establish his justifiable or excusable motive by evidence of the second class.

But, if the defendant alleges in his defense some fact to exist which is so absolutely inconsistent with the alleged charge that it is physically impossible for both to be true, then, if the prisoner's testimony, taken with all the other

testimony in the case, leaves a reasonable doubt on the mind of the jury whether his inconsistent fact does or does not exist, it necessarily leaves a reasonable doubt as to whether he is or is not guilty.

The true rule is, that a prisoner has only to establish a fact which is totally inconsistent with the theory of his guilt by evidence of the third class, as it regards strength and degree of conviction to be produced by that evidence. Let us not be misunderstood on this subject. All the evidence in the case, whether that of the prisoner or the prosecution, must be considered and weighed with all other testimony bearing on the same point.

The prisoner might introduce evidence of an *alibi*, which taken by itself would produce conviction beyond a reasonable doubt of the truth of his alleged defenses, but which, taken in connection with the other proof, would not raise the slightest presumption of the truth of the alleged *alibi*. Alone, it would be proof of the first class; in connection with the proof on the other side, it would not reach the third class of proof as we have classified evidence in this opinion. Thus, A. is accused *of murdering [*567] B. The proof is very strong that he did kill B. and threw his body into a river or sea, from which it has never been recovered. A. introduces proof nearly as strong, showing B. is now living in some other state or country.

If the jury has strong doubts as to whether B. is not alive, could it be possible that they should be clear and without doubt that he was murdered by A? In these days, when miracles have ceased, such propositions are absurd.

The petition lays down this proposition as an axiom, that a fact is not proven by testimony which only raises a doubt as to its existence. Such a proposition only shows that counsel attaches a wrong idea to the term proof; he confounds proof as used in judicial trials with the same word as applied to mathematical demonstrations.

If two respectable men were to swear positively to the existence of a fact, counsel would probably consider it proved. Yet, twenty other men equally reliable, and having a good opportunity of knowing, might swear to the con-

Opinion of the Court—Beatty, J.

trary. Then, certainly, the fact would be left in doubt. So counsel would say of this particular fact, it was at one time *proved*; it afterwards turned out it was not *proved*.

This is a confusion of ideas and terms. Facts are *proved*, as that word is used in speaking of civil or criminal trials, by proof more or less conclusive or satisfactory.

If evidence is introduced tending towards the establishment of a fact, it is in some sense proved, though the proof may be very unsatisfactory. It may be proved so as to raise a conviction of its existence beyond a reasonable doubt; to raise a very strong presumption of its existence, or only a slight probability of its existence; raising a reasonable doubt of the existence of a fact is not only proof, but sufficient proof, in some cases, to influence the judgment of a court or verdict of a jury.

The authorities cited were all carefully examined before the former opinion was written, except that of Mr. Webster.

The opinion of Chief Justice Murray is not in point, because the motive of parties in homicide cases is not required to be proved by the same class of evidence as the *corpus delicti*.

The authority of Chief Justice Shaw is no authority at all, for the same opinion from which it is quoted [*568] shows in another *part thereof that he did not mean what his authority is quoted to sustain.

In regard to the authority of Mr. Webster, we will simply say, we are not in the habit of looking into the arguments of lawyers addressed to juries for authority upon any legal proposition.

The rehearing is denied.

Opinion of the Court—Beatty, J.

CLARK, RESPONDENT, v. P. E. SHANNON,
APPELLANT.

[1 NEVADA 568.]

—WHAT IT INCLUDES.—The law exempts from forced sale a tract in which the homestead is located to the extent of five thousand dollars in value, and does not limit or prescribe the other uses to which it may be put if one use it for a homestead. It makes no difference whether the land is divided by imaginary lines. The entire tract of not exceeding five thousand dollars in value, is protected.

—MORTGAGES UPON, MUST BE EXECUTED BY HUSBAND AND WIFE.—When a homestead tract of land does not exceed five thousand dollars in value, the husband cannot execute a mortgage on any portion thereof without the concurrence of the wife.

from the District Court of the Fourth Judicial District of the State of Nevada, Washoe County, Hon. C. C. Beatty, Judge, residing.

The facts of the case are stated in the opinion.

Harris, for Appellants.

Beatty, for Respondent.

Court, BEATTY, J.:

[*569]

The facts of this case are as follows: In May, 1864, one P. E. Shannon was residing on lot No. 4, in a certain block in Carson City. On lot No. 3 in the same block, and immediately adjoining, he had a livery stable. Each lot was fifty feet wide and one hundred feet deep, the two together making a square of one hundred feet. On the 4th of May, 1864, he executed a mortgage in favor of Respondent, Clark, for eight hundred dollars, and at the same time executed a mortgage to him on No. 3 (the same day) to secure its payment. At the time this mortgage was executed, the wife of Shannon was living with him on lot No. 4, and Shannon was conducting his livery business on lot No. 3. In the latter part of May, 1864, less than a month after the mortgage was executed, Shannon filed in the District Court's office some sort of a declaration of homestead, claiming the premises described both lots three and

Opinion of the Court—Beatty, J.

four. After the passage of the act of 1864-5, providing for the registration of homestead claims, he also had the two lots recorded as a homestead. Clark filed his bill to foreclose the mortgage on lot No. 3, and Shannon resisted the decree for foreclosure on the ground that when he executed the mortgage the stable lot constituted a part of the homestead property, and was not bound by a mortgage in which the wife did not join. The only question raised in the court

below was whether, under the circumstances of this [*570] case, the stable lot *did constitute a part of the homestead property. The court below held that the homestead was confined to the lot on which the dwelling was situated, and did not include a separate lot which was devoted to business purposes.

The statute provides that the homestead, consisting of a quantity of land, together with the dwelling-house thereon and its appurtenances, not exceeding in value the sum of five thousand dollars, to be selected by the owner thereof, shall not be subject to forced sale under execution.

The law also provides that if a levy be made, the owner shall point out to the sheriff what he considers his homestead, and the remainder only shall be subject to sale.

If the owner sets apart property worth more than five thousand dollars, steps may be taken by the plaintiff in execution to appraise the property, and either sell a portion thereof or sell the whole, reserving five thousand dollars of the proceeds for the debtor. It is also provided that no division of the homestead property shall be made without the assent of the owner where it consists of one acre or less.

Here then is the privilege to the debtor of selecting *any land* included in the homestead tract, provided it does not exceed five thousand dollars in value. There is no qualification as to the uses to which it may be applied.

The law also seems to contemplate that the debtor shall not under any circumstances be compelled to accept less than one acre of land for his homestead, although half that quantity might be worth five thousand dollars. It is true, if the homestead is worth over five thousand dollars, whether consisting of an acre or a quarter of an acre, it may be sold

Opinion of the Court—Beatty, J.

paying five thousand dollars of the proceeds of the sale to the debtor. But it cannot be divided, if less than an acre, without his consent. Here there was less than one-fourth of an acre in the two lots. Together they only made an area of one hundred feet square—they were only divided by an imaginary line, dividing lots three and four.

Had the two lots been levied on, can there be any doubt that the defendant, Shannon, might have notified the sheriff that he claimed them as a homestead? If he had done so, it appears to us they could not possibly have been divided. It is *admitted both together [*571] that they are of less value than five thousand dollars. Both lots together contain less than an acre. There could be but two objections suggested to his claim of the two lots—one, that they do not compose one tract of land, because one-half of the land is called lot 4, and the other lot 3; the other, that a distinct portion of the land is devoted to business purposes. But as the line between them is merely imaginary, we think this renders the first position untenable. No one would say that a man might not claim a homestead in a quarter section of land because it was divided by imaginary lines into forty-acre tracts.

We think there is no more force in the other objection that a distinct portion of the property was devoted to business purposes. The only limitation of the right to select a homestead land is that they shall not exceed five thousand dollars in value. We do not think it was the policy of the law to preserve only a residence for the family of the insolvent debtor, but to secure also the means of making a living. To give an insolvent debtor a fine house to live in without any means to support his family, would be an injury to his creditors without a corresponding benefit to the debtor. But to protect him in the enjoyment of a cheap and modest house for his family, together with such adjacent lands or business houses as will enable him to decently support his family, would be a wise and humane policy. We think such was the intention of the law. If a person is protected in the enjoyment of a homestead consisting of several hundred acres of land, not more perhaps than an acre is

Opinion of the Court—Beatty, J.

necessary for house, garden, yard and all out-buildings necessary to the proper enjoyment of his residence. All balance is devoted to the business of farming, by which makes his living. Yet it has never been questioned that farms might be set aside as homesteads. Why may not a shop, a stable, a storehouse, or a hotel, be apart with the homestead lands as readily as a farm, if whole does not exceed in value the sum of five thousand dollars? We can see no reason for the distinction. We think then this property if so claimed would be exempt from execution as a part of the homestead. If exempt from execution, is it not equally exempt from the operation of a mortgage executed without the concurrence of the wife? It was a part of the identical land on which the residence was situated. The whole together was worth less than five thousand dollars. Was the building and occupancy of the house a dedication of the entire tract as a homestead? Or rather, did not the establishment of a homestead on that tract of land attach to the entire tract the privilege of exemption from forced sale so long as the whole tract with its improvements was worth less than five thousand dollars? If so, it appears to us that the husband could not by his own act, without the wife, mortgage a part of the tract although he left a portion of it incumbered.

If the husband may incumber the homestead so far as to leave less than five thousand dollars' worth unincumbered, he may leave only the smallest imaginary amount of property for the homestead—at least the smallest amount on which he could erect a shanty to shelter his family whilst he mortgages the balance. We think that no mortgage executed by the husband alone, upon a homestead tract or a part thereof, can be of any validity unless that homestead tract exceeds five thousand dollars in value. The California courts, in cases similar to this, have held that the husband alone could not set up in his answer to a complaint for foreclosure the fact that the property mortgaged is homestead property, and that his wife had not joined in the mortgage. That before this defense can be made, the

Points decided.

not be a party. If she is not a party, the decree must be against the husband alone, and afterwards the husband and wife may unite in an action for the protection of the homestead. We think when it appears by the pleadings in the case that the property is claimed as a homestead, and such facts are stated as show a probable ground for such claim, a court should not proceed with the trial of the case until a wife is brought into court, so that the decree may consider all parties. But if the case does proceed to trial without the wife being brought in, we are not satisfied but that the husband himself might set up the defense that the mortgage is invalid under the statute, because executed without the wife's concurrence. It is not, however, necessary at this time to decide that point, nor is it necessary to determine at this time what would be the rights of the parties if, on the wife's being brought in, she [*573] could disclaim having any homestead rights in the property in controversy.

The judgment must be reversed and the cause remanded. The court below will cause the wife of Shannon to be made defendant in the case, and upon her answer coming in will proceed to try and determine this case according to the views expressed in this opinion.

J. MILLIKEN ET AL., RESPONDENTS, v. C. O. SLOAT,
APPELLANT.

[1 NEVADA, 573.]

SPECIFIC CONTRACT ACT, IS PROSPECTIVE IN ITS OPERATION.—The Act of the Legislature of the State of Nevada commonly called the "Specific Contract Act," is prospective and not retroactive in its operation.

VOID—UNCONSTITUTIONAL.—Said Act is in conflict with an act of Congress, and therefore void. Constitutionality of the act of Congress making United States treasury notes a legal tender reaffirmed.

LAW OF CONGRESS LICENSING CONTRACTS FOR SALE OF GOLD, CONSTRUED.—The law of Congress approved March 3, 1863, indirectly licensing contracts for the sale of gold, refers to those gold contracts which are not in form technical debts, and must be enforced by action of covenant or assumpsit,

(1.) 1 Nev. 612. Overruled in 4 Nev. 462.

Opinion of the Court—Brosnan, J.

with an assessment and judgment for damages. The licensing such contracts does not repeal or modify the law of Congress making United States notes a legal tender for all debts except duties, imposts and interest on the public debt.

APPEAL from the District Court of the First Judicial District, State of Nevada, Storey County, Hon. RICHARD RINGS presiding.

Wm. G. Murphy, David E. Bailey, Charles E. DeLong, J. Neely Johnson and Hal. Clayton, for Appellant.

Crittenden & Sunderland, Hillyer & Whitman, Tol Robinson, J. Seely, Thos. Wells, Thos. H. Williams and the Attorney-General, G. A. Nourse, for Respondents.

[*576] *By the Court, BROSNAN, J.:

On the 15th day of April, 1864, the appellant executed and delivered to one Finne his promissory note, payable in gold coin on the 15th day of October following. This note was assigned to the respondents, the plaintiffs below. On the 30th day of January, 1865, more than three months after maturity of the note, suit was brought thereon, a demurrer was interposed and overruled; and a final judgment, no answer having been interposed, was rendered in favor of the plaintiffs on the 17th day of February, 1865.

The judgment demanded payment and satisfaction in United States gold coin.

Execution was issued, whereupon the defendant (appellant) tendered the full amount of the judgment and costs in legal tender notes, commonly called "greenbacks," and moved the district court to order satisfaction of the judgment entered of record. This motion was denied, and the appeal in this case is taken from the order and from the judgment. Two objections are prominently presented:

First. The appellant contends that the act of the legislature of this state, passed January 4, 1865, commonly styled the "Specific Contract Act," is prospective and not retroactive in its operation.

Second. That if the act be retrospective, it is void because it conflicts with the act of congress passed February

§, 1862, which declares that the notes of the United States are a legal tender for the payment of debts, etc.

In our opinion, both objections are tenable.

1st. Is this act of January 4, 1865, retroactive in fact? Does it by express terms, or unavoidable implication, so clearly embrace contracts antecedent to its [*577] enactment as not to admit of a different construction?

Retrospective laws have been regarded from remote antiquity as odious and tyrannical, and they have been almost uniformly discountenanced by the courts of Great Britain and the United States. Bracton, in discussing the subject, adopts the maxim of the civil law in these words: "*Nova constitutio futuris formam debit imponere non præteritis.*"

Lord Bacon, in his quaint style, says: "It is in general true that no statute is to have a retrospect beyond the time of its commencement." The French code provides expressly that no law can have a retrospective effect. "All laws," says Blackstone, "should be made to commence *in futuro*;" and the constitution of New Hampshire declares "retrospective laws to be highly injurious, oppressive and unjust." Thus we find that the power of the legislature to enact retrospective laws has been stubbornly denied by many able writers.

Sedgwick, treating of the subject, makes use of the following emphatic language:

"Nothing short of some great paramount emergency of public policy can justify laws of this kind, and it will be well for all engaged in the business of government to understand and remember that the steady and uniform rule should be to make statutes operate prospectively only. No exception should be tolerated but on the ground of a controlling public necessity." (Sedgw. Stat. Law, 202.)

The foregoing suggestions have been advanced with a view to admonish at least against a loose and latitudinarian construction of a species of legislation objectionable and inaccordant with the fundamental principles of the social compact.

We would not be understood, however, as alleging that

Opinion of the Court—BROSNAN, J.

retrospective legislation is not within the scope of the law-making power.

The settled and approved doctrine at this day is, that such power exists outside of an express and positive constitutional inhibition in certain enumerated cases (as for instance, laws of a criminal nature, or laws impairing the obligation of contracts, which are positively inhibited), and that the only check upon this power seems to be, [*578] that the courts will not give a *retrospective interpretation to statutes unless the intention of the law-makers is so plain, either by express words, or by unavoidable implication, as not to fairly admit of the opposite construction. To state the proposition with all the clearness we can command, and to avoid misapprehension, our understanding of the law on this subject as now settled is that the primary rule of construction is to give a statute a prospective effect, but that the rule must yield if the retroactive intention is so plainly expressed or manifest as to leave no doubt upon the mind. And this is confined to cases where no constitutional objection interposes, as before stated.

We will instance some cases wherein laws, though confessedly retrospective, have been held by the judiciary to be unobjectionable. Such are statutes declaring valid acts of officers illegally elected or appointed; confirming the acts of towns and corporations, municipal or otherwise; correcting and ratifying assessments irregularly made; extending the time for the collection of taxes, and confirming the informal levying of the same, and altering and amending the modes of procedure in judicial matters.

In these and other such instances the laws clearly retroact, and *individuals* may sometimes suffer thereby, but such laws are supported solely upon the principle that the interests of the public are involved and deemed paramount to those of individuals, a principle which cannot, we apprehend, be invoked in favor of the respondent in the case at bar.

In support of the doctrine that, in order to give the statute a retroactive effect, the law itself must so state in

Opinion of the Court—Brosnan, J.

express terms, or such intention must be otherwise clearly manifest; we will refer to authorities. When imprisonment debt prevailed in the state of New York, if a person incarcerated for that cause merely stepped beyond the jail gates, it was held to be an escape, and a right of action immediately accrued therefor against the sheriff, and a return on recapture before suit brought was no defense to the action. To remedy this harsh rule the legislature passed an act declaring that a return or recapture before suit should be a good defense. An action was instituted against a sheriff for an escape. During the pending of this action the above mentioned statute was passed, and on the trial it was contended that the sheriff was entitled [*579] to its benefits (a recapture having been pleaded), on the ground that the statute operated retrospectively. There were no express words to denote a retroactive intention.

The court held it did not so act, and Thompson, J., in opinion said: "It may in general be truly observed of prospective laws of every description, that they neither accord with sound legislation nor the fundamental principles of the social compact. How unjust, then, the imputation against the legislature that they intend a law of that description unless the most clear and unequivocal expressions are adopted." (*Dash v. Van Vleet*, 7 J. R. 477.) Indeed the authorities uniformly speak the same language. (*de Bailey v. Mayor*, etc., 7 Hill, 147; *People v. Carnal*, 2 R. 463; *Palmer v. Conly*, 4 Denio, 376.) There is no need of multiplying authorities to this point.

We are of the opinion that when a statute is silent as to its time and events, courts are bound to apply it only prospectively. (*Jarvis v. Jarvis*, 3 Ew. Ch. 462; *Palmer v. Conly*, 4 Denio, 376.)

It may be further observed as a general rule, that a statute affecting rights and liabilities, should not be so construed as to act upon those already existing. To give it that effect the statute should in express terms declare such to be the intention. (*Johnson v. Burrell*, 2 R. 238.)

Now at the time the note in this case was made and

Opinion of the Court--Brosnan, J.

matured, the defendant had a legal right to pay the amount stipulated in legal tender notes. That was the law; it entered into and was a part of the contract. Without determining, however, at this time, whether this was such a "vested right" as the legislature had not the power to overthrow, it was certainly such as ought not to be presumed defeated by their action, inasmuch as they have not declared that intention by express retrospective terms.

Laws of this character partake of the mischiefs of *ex post facto* laws; and when they affect contracts or property, would be equally unjust as *ex post facto* laws when applied to crimes.

We have not overlooked the case upon which the respondent so confidently relies, viz: that of *Galland v. Lewis*, 26 Cal. 46, *in which the same question presented here was decided. That court holds that the California statute, which is precisely like ours, is retrospective and embraces antecedent contracts. While we have the highest respect for the learning and ability of the judges who at present grace the bench of our sister state, we are compelled to say that we *are not* satisfied with the reasoning or authority marshaled in support of that decision.

In the first place, *Galland v. Lewis* does not discuss or decide whether the law was retroactive or only prospective in effect. The learned judge *assumes* it to be retroactive, and thence, by a very natural process, argues that it is *valid*, for the reason that it is not in conflict with any vested right, secured by constitutional guarantee or protected by the principles of universal justice. But the law may be valid, though not necessarily retrospective, so as to embrace and apply to antecedent contracts.

Then the authorities invoked by the court are lamentably out of point.

The Kentucky case (*Cole v. Ross*, 9 B. Monroe, 393), was an action upon a covenant to deliver good merchantable pig metal, at twenty-nine dollars per ton, to a stipulated amount; when the commodity, by the terms of the contract, was to be delivered, the metal had advanced considerably

Opinion of the Court—Brosnan, J.

rice. The defendant tendered the stipulated amount at rate of twenty-nine dollars per ton, when it was worth more. The court held it was "a contract for pig iron and not for money."

Of course, a tender of the amount at the stipulated price of twenty-nine dollars per ton, when its value had been greatly enhanced by the time the contract was to be discharged, would not meet the terms of the obligation. In all cases the doctrine is settled, that the measure of damages is the value of the property at the time of the breach, that amount not having been tendered, the defendant's liability still existed. We find no fault with this doctrine, and fail to discover any analogy between that and the case now under consideration. The case from Indiana we think less pertinent to the question, if possible.

We have, therefore, come to the conclusion that the act of the legislature, approved January 4, [*581], does not embrace contracts entered into before it went into effect, and is prospective only in its operation.

We proceed to the consideration of the second question. Does the act of the legislature passed January 4, 1862, conflict with the legislation of Congress which declares legal tender issues of the United States notes to be a legal tender, on their face, in payment of debts?

The first act giving the character of legal tender to these notes is that of February 25, 1862. Subsequent statutes contain the same phraseology on this subject. After declaring them payable in all transactions to and from the government, except customs, dues and interest on the public debt, the act provides "and shall also be lawful money as a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest as aforesaid." (12 Stat. at Large, 345.)

In the case of *Maynard v. Newman*, this court adjudged the constitutionality and validity of this law. Being valid, it is supreme. The Constitution of the United States so declares in express and positive terms: "This Constitution and the laws of the United States which shall be made

Opinion of the Court—Brosnan, J.

in pursuance thereof, etc., shall be the supreme law of the land, and the judges of every state shall be bound thereby, and anything in the constitution or laws of any state to the contrary notwithstanding." (Const. U. S., Art. VI, Sec. 2)

Having held the act of Congress valid, we cannot fail to perceive a repugnancy between it and the act of the legislature, and consequently the latter must yield. The one applies to all debts, public and private (other than those specifically excepted), and provides that they may be paid and discharged by legal tender notes. The state law embraces debts, not within the excepted cases; and in effect aims at engrafting other exceptions upon the act of Congress. It is making the act to read: except duties on imports, interest on public debt *and* a class of debts *payable in gold coin*. This will not answer. If the legislature has the power to make this exception, it can make other exceptions and thereby emasculate the law of Congress so as to render it practically ineffectual.

[*582] *The demand for which this action was instituted is a *debt*, as designated in the act of Congress, liable to be liquidated and canceled by payment of legal tender notes at their face value. It makes no difference in the eye of the law that the contract calls for payment in gold coin, the legal character of the demand, and the force and effect of the law of Congress still remains impressed upon it. Can a state law withdraw it from the operation of the paramount law? It is a debt, which in virtue of the express mandate of the supreme law may be paid in those issues which that law itself called into existence.

But it is said this statute is merely remedial, and that the remedy is strictly just and equitable.

Admitting all this, and conceding, as we do, that every principle of honor and honesty demands that the debtor should discharge his engagements to the letter, still the position we take remains unaffected. As between the parties, it would be strictly equitable and just to compel the performance of the contract according to its express terms, but in the teeth of the legislation of Congress the court has not the power, and we cannot exercise jurisdiction in the

main of ethics, however ignominiously a debtor may act refusing to observe a sacred regard for his obligations. The stubborn ever-recurring question is, does this act conflict with the law of Congress? If it does, no matter how remedial or equitable it may be, it is void, and must disappear before the majesty of the higher law. Was the debt a question within the provisions of the act of Congress? Yes. Was it of either class exempted by the terms of that act? Certainly not. By what power or authority, then, can the legislature of a state exempt or disenthral it from the embrace and operation of the national edict? This act is in derogation of the act of Congress. All such laws stand in direct and brazen antagonism to the policy of the nation, and, practically extended through several states, during the rayless period of the nation's travail, would have inflicted a wound upon constitutional liberty which the coming ages would not see healed. Such laws in the face of the action of the Congress of the United States, asserts that most abused, because illy understood, doctrine of state rights in its most odious and intolerant aspect.

*We are told that two kinds of currency exist, [*583] and that both are different in intrinsic value. Granted as a fact; yet in the eye and judgment of the law, for the purpose of discharging debts not excepted in the act of Congress, they are identical, rather equivalent.

By positive law a legal equality is established between the metallic coinage and the paper currency of the government, and I hold that *judicial* inquiry is not admissible to make any distinction between them, where the debt or obligation is expressed in federal money or currency. Casuists may attempt to discriminate, but their logic will limp and halt.

Government has the power to reduce the weight or debase the fineness of its metallic currency, yet debts contracted, while the standard of weight is say one hundred grains to the dollar, may be discharged by the new coin, though decreased in intrinsic value to a standard below one hundred; we presume this will not be denied. Indeed, such fact is part of the history of our government. Yet we have heard

Opinion of the Court—Brosnan, J.

no complaints on that ground. We have not read of any objection to the exercise of the power.

The first silver dollars coined in 1794 weighed each four hundred and sixteen grains; in 1847 the standard weight of the silver dollar was reduced to four hundred and twelve and a half grains.

In 1834 the weight of fine gold to the dollar was reduced, and in 1837 the standard of weight was insignificantly advanced to the point at which, we think, it now stands, namely, a nominal fraction over twenty-three grains.

Take an illustration: A. borrows from B. one thousand dollars in gold, and agrees to pay it in one year, gold coin alone being current, legal tender, the standard weight of the gold coin at the time of the contract being fixed by law at twenty-five grains, but before the day of payment, Congress, by law, reduces the standard weight of the dollar to twenty grains, but making it a legal tender, cannot the debtor discharge the debt with the new coin, although of less intrinsic value than the coin he had of his creditor? We hold that he can; because the creditor is bound to receive the public currency, and bound to receive it at its legal value. *Ita lex scripta est.* (1 Bouv. L. D. 358.)

[*584] *On principle, do the creditor's rights or conditions stand upon a different footing, when the same sovereign power which made the dollar of diminished intrinsic value an equivalent in law for the other of greater intrinsic value has declared that its notes of issue shall have the like effect? We think not.

In this there is nothing startling. It is incidental to the mutations natural in governmental as in commercial affairs. And as debts that may have been contracted while gold and silver were the only legal tender (this debt was not of that kind) may now be discharged in United States notes, so debts incurred during the present state and condition of monetary affairs, though contracted upon a paper basis and calculation, will be paid in gold and silver when the metallic currency shall again become the sole legal tender—a period, we are happy to believe, fast approaching.

We have reached the following conclusion in this case.

Opinion of Beatty, J., on rehearing.

or much sincere and anxious deliberation: The question discussed in the last point is new, and we had consequently rely upon our own reflection and judgment, unaided light from adjudicated cases. It is indeed true that the supreme court of California, in *Carpentier v. Atherton* (25 Cal. 565), have held a doctrine different from that we here maintain.

It is not from disinclination that we fail to approve the opinion of that learned court upon so grave a question as one involved, but a sense of duty and responsibility to our convictions of what we believe the law really is, forces us to a conclusion opposite to that declared by that able and highly respectable tribunal.

Our opinion is, that the act of January 4, 1865, is in conflict with the law of Congress to which we have referred, and that it is therefore void.

The judgment and the order appealed from must be reversed so far as it demands payment in gold coin, and the court below is directed to enter satisfaction of the judgment upon payment by the appellant, in any legal tender recognized by the laws of the United States, the full amount of the judgment and costs.

The costs of this appeal will be paid by the respondents. It is accordingly so ordered.

By LEWIS, C. J., dissenting: I dissent.

*OPINION ON REHEARING.

[*585]

By the Court, BEATTY, J.:

In this case a rehearing was granted not so much because the majority of the court, who concurred in the original opinion had any doubt about its correctness, but for the reason that it involved not only the interests of the immediate parties to that suit, but also large interests which were not represented before this court when the case was decided.

In the argument, upon rehearing, the counsel for respondents not only argued the question as to the legality of the

Opinion of Beatty, J., on rehearing.

act of the legislature of this State, which was in controversy, but went into an elaborate argument of the constitutionality of the act of Congress, making United States notes a legal tender.

The latter question was carefully considered by this court in the case of *Maynard v. Newman*, and we came to the unanimous conclusion that the act was constitutional.

We heard nothing in the reargument of this case calculated in the slightest degree to raise a doubt in our minds as to the correctness of our conclusions in that case. We abide by that decision, and have nothing to alter or amend therein.

We think that decision fully sustained by the unanimous opinion of the supreme court of the United States in the case of *McCulloch v. The State of Maryland*.

The constitutionality of the very act under consideration has been sustained by the courts of highest resort in New York, California, and, we believe, four or five other states, though we have before us only the decisions of New York and California on this subject. (See *Metropolitan Bank & al. v. Van Dyck*, 27 N. Y. 400; *Lick v. Faulkner*, 25 Cal. 404.)

We learn from newspaper report that the court of appeal of the State of Kentucky has held the act to be unconstitutional.

There is then an overwhelming weight of judicial authority sustaining the constitutionality of the law.

On the other side we have not been referred to one single judicial opinion (even the Kentucky decision was [*586] not referred *to), but we have had quoted a number of political speeches made in Congress, some whilst this law was under consideration, others when totally different matters were being discussed.

The opinions of great men are entitled to some consideration at all times. But those who are familiar with the history of this country and know how often our great men have changed their views about the constitutional powers of Congress, will not be disposed to give great weight to opinions about such matters expressed in political debates. Perhaps the absurdity of giving weight to such opinions

Opinion of Beatty, J., on rehearing.

uld not be better shown than by simply mentioning the
t that the respondents quote Daniel Webster as authority
: the strict construction doctrines advocated by them,
ilst the appellant quotes John C. Calhoun as authority
: the doctrine that government may issue bills of credit.
Of all our distinguished public men, John C. Calhoun
d Thomas Jefferson carried their state rights views to the
st extreme and pernicious limits. Calhoun is quoted as
thority for issuing bills of credit. Thomas Jefferson
otioned the purchase and acquisition of Louisiana, an
t more difficult to justify under the Constitution than any
her act ever performed by the general government prior
that time. Since then we have followed the precedent
d acquired various other territories. Indeed, it might be
own that no state rights politician has ever hesitated
ben in power to administer the affairs of government upon
inciples completely at variance with those views expressed
ilst in opposition to some other existing administration.
Before leaving this branch of the case, the writer of this
inion cannot refrain from expressing his dissent from
me of the views expressed by counsel in the argument.
e of the learned counsel for respondents asserts that the
vocates of the doctrine that Congress has the power to
ike treasury notes a legal tender, must show that power to
conferred under some one of the special grants of power
umerated in section 8 of article I of the Constitution, or
il to sustain their cause.

That the doctrine that Congress may derive such power
m the general nature of the authority conferred
them, and the *necessity of selecting the proper [*587]
ans of carrying out their delegated authority and
aintaining the existence of the government, is a new and
rtling theory. Yet this is precisely the theory maintained
the supreme court in the case of *McCulloch v. State of*
ryland. The court there do not put the authority to
rter a bank upon any one of the delegated authorities.
t they put it on the doctrine that there are many expressly
egated powers, such as to "levy and collect taxes, to
row money, to regulate commerce, to declare and con-

Opinion of Beatty, J., on rehearing.

duct a war, to raise and support armies and a navy," etc., and that Congress must have the choice of means to aid and assist in carrying out these primary objects of the government.

If a bank will facilitate them in doing any or all these things, they have a right to charter it. Just so in this case, if the making of treasury notes a legal tender is calculated to aid and facilitate the action of the government in collecting revenue, conducting a war, preserving its own existence, and performing many other of the expressly granted powers of Congress, it is constitutional. The counsel failed to show any distinction, or even to attempt to show any between this case and the one referred to. Certainly he may read the opinion of the supreme court of the United States in the case referred to, through from the first to the last line, and he will not find any place where the court refers the power of Congress to charter a bank to any one of the expressly delegated powers. Yet he claims that the same doctrine, when asserted in *Maynard v. Newman*, is new, startling, and without precedent.

There is another portion of the opinion in *Maynard v. Newman*, which drew from the same counsel some most remarkable comments.

In speaking of that portion of the opinion which treats of the first clause of section 8, article I, of the Constitution, counsel stated that if the author of the opinion had discovered to what the views therein expressed lead, he would have shrunk back startled and amazed, as if he had suddenly discovered a yawning chasm in the path along which he had been daily accustomed to walk unconscious of the danger beneath.

[*588] *He then went on to argue that such a construction of the Constitution would give almost unlimited power to Congress and create the most odious and revolting of despotisms.

Undoubtedly such a construction might somewhat enlarge the powers of Congress, yet they would not be unlimited. There are many express restrictions on the power of Congress in the Constitution.

 Opinion of Beatty, J., on rehearing.

the Constitution authorized Congress to do any act that body thought conducive to the common defense and the perpetual maintenance of the general government, except those things which are expressly prohibited by the Constitution, yet Congress would not then have unlimited power than the state legislatures generally. Why, then, should we assume that under Congressional rule the government would become an odious despotism?

We assume that every man who fills the executive chair or occupies a seat in Congress should be a Caligula, whilst every state legislature is held pure and unmaculate? As a general rule, the smaller and more numerous the legislative body, the more is it liable to be governed by selfish and corrupt motives. Take a school in which there are only twelve voters, five of them owning all the real estate, and seven of them owning personal property, and the seven will vote a tax heavily on the real estate to build a school-house. If the majority should be the other way, they will levy the tax heavily on the personal estate. So, too, instances are not wanting of state legislators and executives being purchaseable like cattle in the market.

Though there have doubtless been some corrupt members of Congress, there has never been a wholesale purchase of the body.

We may reasonably hope, from its numbers and respectability, that it never will be purchasable.

Far from Congress ever having played the part of a tyrant, the only reasonable complaint of the people has been that under the trying circumstances of the late civil war they failed to exercise that severity against the enemies of the country which has under similar circumstances been exercised by every other government in the world. We think it bad taste, to say the least, to charge that government with a tendency to despotism, which, during a four years' struggle for its existence has not only conducted a gigantic war against

Opinion of Beatty, J., on rehearing.

its revolted states with more humanity and forbearance than was ever shown by any other nation whilst engaged in such a war, but during the entire period has given protection alike to its patriotic citizens and to the thousands, we might perhaps say millions, of discontented residents within its acknowledged jurisdiction, who have openly sympathized with the public enemy, rejoiced at their victories, groaned over their defeats, and, as far as in their power lay, furnished money, means and men to overthrow the government which was protecting them. The history of the world may be searched in vain for a parallel case.

But we feel that we have already said enough on this branch of the subject, and refer to the opinion in *Maynard v. Newman*, for the reasons for holding the act of congress constitutional.

Let us now examine the act of Congress and of this state and see if they are in conflict.

The act of Congress approved February 25, 1862, authorizes the issuance of one hundred and fifty millions of United States notes (more commonly called greenbacks or Treasury notes), and provides, among other things, that such notes shall be "lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest as aforesaid."

The interest referred to is the interest on the public debt. Subsequently other laws were passed authorizing additional issues of United States notes, which are also made legal tenders. The question is, does the state law conflict with the law of Congress. The language of the congressional act is certainly very broad. It provides such notes shall be a legal tender for *all* debts. Now what is a debt? Bouvier defines a debt to be "a sum of money due by certain and express agreement." He further says: "Debts arise or are proved by matter of record, as judgment debts; by [*590] bonds or *specialties; and by simple contracts, where the quantity is fixed and specified, and does not depend on any future valuation to settle it."

Burrill gives Mr. Stephens as authority for the proposition that a debt is not a contract, "but the result of a contract."

Opinion of Beatty, J., on rehearing.

He further says: "The word debt is of large import, including not only debts of record or judgments and debts by specialty, but also obligations arising under simple contract a very wide extent." These are the technical and correct definitions of debt. Both authors show that in a popular sense and under some circumstances the word debt may be more, but never less comprehensive.

A promise, then, to pay a certain or definite sum in United States gold coin is a debt; for nobody disputes the fact that gold coin is money.

The state law provides in section 2d, that "In an action on an express contract, or obligation, for the direct payment of money, made payable in a specified kind of money or currency, judgment for the prevailing party, whether the same be by default or after verdict or decision of the court or referee, shall follow the contract or obligation and be made payable in the kind of money or currency specified herein." In section 3d it provides, when directing how the execution shall issue to enforce judgment, as follows:

"If it be issued on a judgment made payable in a specified kind of money or currency, as provided in section 2 of this act, it shall also require the sheriff to satisfy the same in the kind of money or currency in which said judgment is made payable, and the sheriff shall refuse payment in any other kind of money or currency; and in case of levy and sale of the property of the judgment debtor, he shall refuse payment from any purchaser at such sale in any other kind of money or currency than that specified in the execution."

Now, taking these two provisions together, does not the state law clearly provide that the United States notes shall not be a legal tender for certain debts which are not excepted in the act of Congress?

The obligation to pay gold is a debt; the judgment on that obligation is also a debt. The state law prohibits the sheriff from taking United States notes *^[591] or anything else but gold on a debt expressed to be payable in gold. Taking the two laws together, they may be said to read thus: United States notes shall be lawful

Opinion of Beatty, J., on rehearing.

money and a legal tender for all debts except impost duties, interest on the public debt, and such debts as contracting parties may expressly agree shall be discharged in another and different kind of money.

In other words, here is an amendment, an additional exception engrafted on the law of Congress by a state legislature. But this is not the only amendment to the act of Congress passed by this state. Another section provides as follows: "The provisions of this act shall apply to all actions on implied contracts or obligations contracted or incurred after the passage of this act, when it shall appear on the trial to the satisfaction of the court, jury or referee, that the debt or obligation was contracted or incurred upon the basis of any particular kind of money or currency." If the state legislature could pass these sections modifying and controlling the act of Congress, they could certainly pass others of a similar nature. They could add another section of the law declaring that all contracts made in the state should be taken, held and presumed to have been contracted on a gold basis, except where the contrary should be shown by the production of a written agreement specifying that payment was to be or might be made in United States notes. The legislature might, by a still further clause, enact that when a contract was made payable in United States notes, and suit was brought on such contract, that no judgment should be rendered on said contract payable in such notes or in money generally, but a jury should ascertain what was the gold value of the notes the day they were by contract to be paid; that a judgment should be rendered for such amount, which should only be discharged with gold coin. The enactment of these several clauses would completely repeal the act of Congress, and the parties to money contracts would stand precisely as if no such law had ever been passed. If Congress had never enacted that such notes should be legal tenders or lawful money, still a citizen might contract to pay an amount of them at a certain day. If he tendered them at the day fixed it would be a good tender as of personal property. If [*592] he failed *to tender them that day a cause of action would arise to recover their value in money.

Opinion of Beatty, J., on rehearing.

Can it be contended that Congress may legally pass a law and a state legislature may legally repeal it? If they can repeal it, can they modify it?

We have shown that the state law under discussion does modify the act of Congress in two particulars. If two other modifications are made (we cannot see why the legislature should not modify the law in four particulars if it may in two) the effect will be to render the law entirely inoperative. We cannot see much difference between repealing a law in express terms, and so restricting and modifying its terms as to render it totally inoperative.

But it is said Congress has made both gold and United States notes a legal tender, and a debtor may waive his right to pay in notes and pay in gold coin. That nobody disputes. If any man owes a debt, he may pay it in gold if he likes to do so, and has the gold wherewith to pay. The state could not prohibit him from so doing. But those who talk about a waiver under the provisions of the state law do not seem to understand the meaning of the term as here used. A waiver is defined to be "the relinquishment or release to accept of a right." Now in all, or at least most of these contracts made under the specific contract act, the debtor binds himself at the very inception of the debt that he will pay in gold and not in paper money. Then if the contract is a legal one, he never did have the right or power to discharge his debt in paper money.

Why, then, talk about waiving a right he never possessed? It is true that when a new note is given for an antecedent debt, it might, with propriety, be said that if the debt was payable in money generally, and the new note stipulated for payment in gold coin, this would be a waiver of a pre-existing right. But in most cases gold notes are given for a consideration which passes when the note is exchanged. In such case the debtor (supposing the state law to be valid) never possessed the right to pay in anything but gold. How could he waive a right he never possessed? The use of this term is simply an evasion of the real issue. The true question is this: Can a state legislature license two of its citizens to contract that

Opinion of Beatty, J., on rehearing.

a positive law of Congress shall be inoperative and void as far as it affects their pecuniary transactions? The proposition put in plain English would be laughed at. Hence the necessity of covering it up and concealing the true point by the use of false terms.

There can be no doubt, as a general rule, that a man may, in a civil action, waive most of his rights. But parties to actions cannot waive the rights of strangers nor supersede the laws of the land.

In those states where they have statutes making notes given for usury and on gaming considerations void, one who is sued on such notes may fail to answer, and thereby waive his right to make such defense.

But suppose a case where a party gives a note for usury or for a gaming consideration, and inserts a clause in the note, whereby he agrees not to plead the usurious or gambling consideration of the note as a defense. When he is sued he does, notwithstanding his promise to the contrary, plead usury or gaming, as the case may be, and the other party puts in his replication admitting the illegality of the consideration, but setting up this special contract not to put in the plea of such illegality, would not such a replication be received by any court as a pleasantry rather than a serious defense? Is there a lawyer in the world, having a particle of common sense or the least regard for his character and reputation, who would attempt seriously to support such a pleading by argument? Any lawyer would say at once, this is absurd.

Two people, by their private agreement, cannot suspend the operation of a positive statutory enactment. Yet is not that case precisely the same as the one under consideration with this exception?

In the case put, the parties upon their own authority attempt to suspend the operation of a public act.

In this case two parties attempt to suspend or modify the operation of an act of Congress and plead a license from the state for so doing.

Another instance, a party wishing to raise more mortgages his estate and agrees in the instrument

Opinion of Beatty, J., on rehearing.

mortgage that if the *debt is not paid at maturity [*594] will waive his right to redeem, and the title of the estate shall thereupon pass absolutely to the mortgagee. There is no express law forbidding such contracts, but they are thought to be hard, unfair and oppressive. Courts have universally disregarded such agreements (or waivers, perhaps respondents would rather call them), and allowed the mortgagor to redeem on equitable terms, although the debt was not paid or tendered at maturity.

These examples show that courts do not regard or enforce contracts made either in violation of public statutes or in violation of public policy.

We are told that the law requires of indorsers that a demand should be made by them at the proper time and place on the maker of a note, and if he fails to pay, prompt notice should be given to the indorser, and if these things are not done the indorser is not liable.

But if at a time a man indorses a note he writes on the back of the note, "I waive demand and notice of non-payment," he is liable notwithstanding there is no demand and no notice of non-payment.

We are told this is a case exactly like that of waiving the right to pay a debt in a particular kind of currency.

This is certainly an ingenious argument, and might be well calculated to deceive a man who was not a lawyer. But the court should be presumed to have some little knowledge of the reason on which rules of law are founded. Why is an indorser liable at any time?

Simply because he has contracted to be liable. When he writes his name in blank on the back of a note, it is in effect signing a written contract, or rather affixing his signature to a blank contract which he authorizes another to fill up to his effect: "For value received, I assign the within note to A B, and agree that if he presents it to the maker the day it is due, demands payment, and in case of a refusal or failure to pay notifies me promptly, I will be responsible for amount of note, interest and costs."

But if at the time he writes his name he also indorses on the note, "I waive demand and notice," then his contract is

Opinion of Beatty, J., on rehearing.

to this effect: "I assign the within note to [*595] if the maker does *not pay the same at maturity he will be responsible for amount of note interest."

Here the responsibility of the indorser is changed because he has made a different contract. There is not a word of law saying the indorser may not make the one contract or the other. He has made in either case a legal contract (one which contravenes no written nor unwritten law) in express words, but by implication arising from the contract and general understanding of the parties. Just as by implication of law agrees and contracts to pay for a bill he orders a merchant to send to his house or store. In direct words he says nothing about paying. But were a statutory law declaring that no indorser of a negotiable note or bill of exchange should be liable on indorsement, whatever the form thereof, without due demand and protest as required by the law merchant, no contract of the parties could dispense with or waive the operation of that law. So in this case the parties, by contract, waive, destroy or set aside the express provision of the law of Congress.

We have in a manner, at least satisfactory to our minds, shown this act of the legislature is in direct conflict with the very words of the act of Congress.

We think it may as readily be shown it is in conflict with the policy of Congress. The act says the notes to be legal tender shall be a legal tender for all debts, etc., except, and that debts may be considered under two classes.

First—Debts contracted before the passage of the act.
Second—Debts contracted subsequent to its passage.
It has been questioned whether the act was intended to be retroactive and apply to former debts, but no one questions that it was intended to apply to future or subsequent debts. If the law applies to pre-existing debts (and it has been so held by this and other courts), Congress may have been influenced by two motives in making them a legal tender:—

First, to afford a relief to the debtor class who

Opinion of Beatty, J., on rehearing.

erwise have been ruined by the exorbitant demand for, and sudden rise in, the price of gold, in fact from its most total withdrawal from circulation in the Western states. The only *other motive that could [*596] have actuated Congress in making them a legal tender for this class of debts, must have been to render the notes more valuable and to prevent as far as practicable any greater depreciation in the market.

In making them a legal tender for future debts, they must have been influenced mainly by the latter motive. Even without the act making them lawful money and a legal tender, parties might have contracted for the payment of such debts in their ordinary business, and although without the act making them lawful money, etc., no judgment could have been discharged in such paper, the money judgments on such contracts would only have been for the cash value of the notes, which would not have been particularly oppressive.

Then we can see no object that could have influenced Congress to make them a legal tender for future debts, but that of making the notes more current, giving them more value in the market, and checking as far as might be their depreciation. Any law or contract which would prevent their being received as a legal tender for any purpose other than those exceptions made by Congress, would have the net effect of diminishing their circulation, decreasing their value, and to some extent increasing their depreciation. We think, then, that the law of the state, and contracts made under it, are directly in conflict with the law of Congress, and contrary to the policy of the government.

Being contrary to the letter of the law, the state act is effectual to prevent the United States notes from being a legal tender for any debt, whether the same be evidenced by a matter of record [judgment], by specialty or by simple contracts.

Whether debts contracted in violation of the spirit of the act, in contravention of public policy, and with a view to evade the letter of the law, are not absolutely void, is a question which has not been argued or presented before this court, and on which it is not necessary to pass.

Opinion of Beatty, J., on rehearing.

But it is contended that whatever may have been the effect of the law of Congress we have been considering, that that body afterwards passed laws in effect licensing and legalizing loans of gold, fixing the stamp duties which [*597] should be paid on *such loans, etc., and that it cannot be contended that Congress would license an act to be done and still deny a party all benefit arising from said act. Deny him the right to enforce a contract after he had paid the government for the right to enter into it.

The first act referred to is one passed, or rather approved, March 3, 1863, entitled "An act to amend an act entitled an act to provide internal revenue to support the government and pay interest on the public debt," approved July 1, 1862, and for other purposes.

This act has been repealed, and is not now a part of the law of the country. But the note sued on in the case under consideration was executed in April, 1864, while this act was in force. Let us see how it is to be affected by the act referred to. Section 4 provides as follows—we quote only such portions as can effect the question being discussed:

"That all contracts for the purchase or sale of gold or silver coin, or bullion, and all contracts for the loan of money or currency secured by pledge or deposit, or other disposition of gold or silver coin of the United States, if to be performed after a period exceeding three days, shall be in writing or printed, and signed by the parties or their agents or attorneys, and shall have one or more adhesive stamps as provided in the act of which this is an amendment, equal in amount to one-half of one percentum, and interest at the rate of six percentum per annum on the amount so loaned, pledged or deposited.

"And no loan of currency or money on the security of gold or silver coin of the United States as aforesaid, or of any certificate or other evidence of deposit payable in gold or silver coin shall be made, exceeding in amount the par value of the coin pledged or deposited as security; and any such loan so made, or attempted to be made, shall be entirely void. Provided, that if gold or silver coin be loaned at its par value, it shall be subject only to the duty imposed on other loans."

Opinion of Beatty, J., on rehearing.

Sec. 5 is as follows: "That all contracts, loans, or sales of gold and silver coin and bullion not made in accordance with this act, shall be wholly and absolutely void."

This act indirectly licenses contracts for the sale, purchase and delivery of gold coin. That is, it [*598] imposes a tax of half of one per cent. on such transactions, and this may be said to be a sort of indirect license. Now is a note for the payment of certain sums of money in gold coin a contract for the sale and delivery of gold? If there is no distinction between the contracts, then the contract sued on in this case is utterly void for want of the proper stamp of half of one per cent. of its face, and the appellant would be in a much better condition than he was placed by the former decision of the court. If such be the case the judgment is erroneous, and the appellant, by prosecuting this appeal from the judgment, can get rid of the whole debt. He would be neither bound to pay in coin nor paper money. But, we presume, is proving too much for the respondents. But if a note to pay a debt in gold, and a contract for the delivery of gold, are not the same thing, then this law has nothing to do with the former act of Congress declaring certain paper money should be a legal tender for *all debts*. The respondents must take one horn or the other of the dilemma.

It is said that although the fourth section of this act speaks only of the purchase, sale and delivery of gold, voiding all such words as "debts," "loans," "borrow," "pay," etc., which are the distinctive words used in money transactions, still the fifth section declares that all contracts, loans, or sales of gold or silver coin and bullion, not made in accordance with this act, shall be wholly and absolutely void.

It is attempted here to connect loans with gold and silver coins. If that is the true meaning, then every loan of gold coin made on this coast between March 3, 1863, and June 30, 1864, is entirely void, and a party having paid such loans within the last twelve months may recover the amount back, unless the repeal of the law has taken away their remedy. Any way, all notes outstanding, executed for gold

Opinion of Beatty, J., on rehearing.

loaned, would be utterly void. We say this because no man on this coast ever thought of putting stamps amounting to half of one per cent. on such notes. No notes signed by both parties, as the act of Congress on gold contracts to be under penalty of forfeiture.

But we take a different view of this act. We [*599] the *contract referred to in section four as contracts for the delivery of gold coin or bullion in such form as not to be *technical debts*; that Congress passed the law of March 3, 1863, tolerating rather than punishing such transactions. It imposed such burdens on that kind of contracts as to discourage them. The word in the fifth section does not refer to loans of gold, but of paper on a deposit of gold beyond its par value is prohibited in section four. If parties make a contract for the delivery of gold, and so make it as not to be a technical debt, then if the gold is not delivered, they would have their common law remedy—the action in covenant or assumpsit for the value of the gold when it should have been delivered.

This would be the subject of inquiry and assessment before a jury or other proper tribunal. But if the obligation be in the form of a debt, what in law is a technical debt? a direct promise to pay money, whether it be money given or any kind of currency made money by law, it may be discharged by a tender of money without any inquiry or delay.

June 17, 1864, an act of Congress was approved prohibiting purchases of gold on time; prohibiting sales of gold by those who did not have it at the time of sale, etc., and imposing various other provisions to check gambling in gold. This law was repealed in fifteen days after it was passed. How that law is to affect the question before us we do not understand. There is nothing in it repealing or interfering with the act of Congress which says United States notes shall be legal tender for *all debts*. There is no conflict, never was a conflict, that we can see, between the two laws. There ever was, this latter law is repealed and out of the way. It is said that such acts show that it was not

Opinion of Beatty, J., on rehearing.

of Congress to prohibit gold contracts. We think differently. But suppose we admit that it was not the policy to prohibit gold contracts of various kinds, what has that to do with the question before us?

In all civilized countries (so far as we are aware), gambling debts have either been held void by the courts on principles of public policy and natural justice, or else declared void by special legislative enactment. But in many civilized countries they license gambling houses under certain restrictions. We never heard that [*600] licensing a gambling house gave validity to gambling debts; that a note given for a gambling consideration would be good directly in opposition to the letter of the law declaring all such notes void, because it was given in a licensed gambling house.

Congress, conscious of its inability to entirely prevent dealing in gold, licenses such transactions upon the payment of certain duties, why should that be construed a repeal of a positive and plain enactment that paper money should be a legal tender for all private debts. We have decided this case, not on the policy of the government (although perhaps we might have come to the same conclusion on that ground), but on the very letter of the law which says that paper money shall be a legal tender for *all debts*, with certain exceptions. And we know, and every lawyer knows, that a promise to pay fifteen hundred dollars in United States gold coin is a debt under any definition of the word that ever was given by a sane man, whether that definition was the strict technical meaning of the word or the more extended meaning which the word sometimes has in common parlance. Indeed, no counsel has denied that it was debt in its strictest and most technical sense.

But they say it is not such a debt as Congress contemplated. The word debt has two meanings, one is technical and limited in its application. In this sense it is generally understood by lawyers. It has a rather less technical and more extended signification as used among non-professionals. When the expression *all debts* was used, it either meant *all debts* in the technical sense, or *all debts* in the

Opinion of Beatty, J., on rehearing.

popular sense, or all debts that are included in either sense. This debt is included in either definition, and in both, so it must be covered by the act.

But it is said Congress did not mean *all debts*. It could not have been the intention of Congress to include debts payable in wheat, corn, horses, etc.; that these are debts, but of such a nature that as debts they can only be discharged by a tender of the specific property; that if such tender is not made, then an action arises to recover in damages the value of the article or other property which [*601] should have been *tendered; that no tender of money can discharge such a debt; that a promise to pay gold coin is of the same nature; that by the contract it is deprived of its character of a simple indebtedness, and assumes the nature of a property debt payable in wheat or corn, and can only be discharged by a delivery of the specific property. This is rather a specious argument to captivate those who are ignorant of all legal principles, but certainly ought not to be expected to mislead a court of common intelligence.

In the first place, it is not like a note or agreement for the payment of wheat, etc., because the latter are not technically debts; the note for gold coin is a technical debt. And the words "all debts" must be understood to include all technical debts which is a very limited class of contracts, although it might not be construed to include the more numerous class of contracts embraced by that term as popularly employed. But there is a further answer to this proposition.

Respondents have assumed and asserted that a debt payable in wheat cannot be discharged by a tender of money. When they made this assertion they had not looked at their law books on this subject, or they would not have made so palpable a blunder. If one gives a note or obligation in this form: "I promise to pay A. B. one thousand dollars in good merchantable wheat, delivered at his mill on or before a certain day, there is not the slightest doubt it may be discharged by the payment or a tender of one thousand dollars. If there is any decision to the contrary, we have

Opinion of Beatty, J., on rehearing.

seen or heard of it. If the note be in this form: "I to pay A. B. one thousand dollars in wheat *at one dollar per bushel*," the courts have been divided as to whether one thousand dollars will or will not discharge a contract. Some courts have said this is a debt of one thousand dollars which the debtor has the right to discharge at once with one thousand bushels of wheat. Others say it is a contract for one thousand bushels of wheat, and wheat is worth two dollars per bushel at the time it is delivered, the obligation can only be satisfied by delivery of one thousand bushels of wheat, or the pay-damages equal in amount to the value of one thousand bushels the day it should have been delivered.

In any case where a certain sum is to be paid [*602] in lieu of delivery of personal property at its market value on the day of delivery, that contract may be discharged by paying the money in lieu of the property. (See on this subject, Parson's Con. vol. 2, 490-492, and notes and cases there cited.)

In the case of *Cole v. Ross*, (9 B. Monroe, 393) cited by the court of California in the case of *Galland v. Lewis*, it was held that money could not be tendered for a specific contract payable in property, is one of those class of cases where not only the amount to be paid but the price of the property to be delivered is fixed. There was a promise to deliver one thousand three hundred and thirty-three dollars and thirty-three and one-third cents in pig metal at twenty-nine dollars per ton. Now, if you divide the sum of money by the price of the property, you find the dividend will be nearly one hundred and fifteen. Then this was a contract to pay one thousand three hundred and thirty-three dollars and thirty-three and one-third cents, which the debtor was to discharge by the privilege of paying by delivering one hundred and fifteen tons of pig metal; or else it was an absolute agreement to deliver one hundred and fifteen tons of pig metal. The courts have construed such contracts each way. The majority court put the latter construction on it. That contract to deliver one hundred and fifteen tons of pig metal had risen above twenty-nine dollars

Opinion of Beatty, J., on rehearing.

per ton in value before the day of delivery; consequently three thousand three hundred and thirty-three dollars and thirty-three and one-third cents would not discharge the obligation. But if the obligation had been to pay three thousand three hundred and thirty-three dollars and thirty-three and one-third cents in pig metal at its market value the day it was to be delivered, then we may clearly infer from the remarks of the court in the case cited that a tender of the money would have discharged the obligation. And such is the tenor of all the decisions on this subject. In other words, not only all technical debts, but all contracts which are substantially debts, although they call for the delivery of personal property other than money, may be discharged in whatever kind of money the government declares a legal tender.

[*603] *Again, if this and similar contracts are what respondents claim them to be, mere contracts for the delivery of personal property, which can be performed only by the delivery of the specific article promised, then there was no necessity for the passage of what we call the "specific contract act." For if the debtor refused to deliver the gold coin at the day promised the creditor could sue and recover the value of the coin the day it should have been delivered.

The common law gave an adequate remedy. Why, then, pass the law under consideration? Simply to call things by wrong names, to term a simple judgment for money a judgment [decree] for the specific performance of a contract. To enable courts to trample upon and spurn a law of Congress, in a manner not quite so palpable or so easily comprehended by the community as it would have been if they had disregarded the law without all this legislative subterfuge.

We are earnestly implored, if we cannot find any legal ground to sustain this act, that we should sustain it on grounds of public policy. Twelve months ago the money lenders assured the legislature if they would pass this law the business of the state would be restored to a prosperous condition. The law was passed, and within twelve months

Opinion of Lewis, C. J., dissenting.

assessed value of the property in the state has diminished more than one-third. Nearly the entire population is arrassed and groaning under debts bearing such a rate nterest as must reduce them to bankruptcy if they cannot get a change of laws and financial policy. We certainly not see anything so encouraging in the system as to induce us to disregard all legal principle and rules of common sense to sustain it.

The judgment rendered by this court before the granting rehearing must stand as the judgment of the court.

By LEWIS, C. J., dissenting:

As the precise question involved in this case was thoroughly sidered and passed upon by the supreme court of California in the case of *Carpentier v. Atherton* (25 Cal.) I deem unnecessary to do more than to refer to the opinions in that case for the reasoning which seems to me sufficient to justify my dissent from the conclusions of my associates in case at bar.





DECISIONS
OF
THE SUPREME COURT
OF THE
STATE OF NEVADA.

JANUARY TERM, 1866.

L. K. MITCHELL ET AL., RESPONDENTS, *v.* M. BROMBERGER, APPELLANT.

[1 NEVADA, 604.]

ATTORNEY'S FEES—FROM WHOM COLLECTABLE.—An attorney who, at the request and for the benefit of a debtor, appears of record for the creditor in a confession of judgment by the debtor, may recover what his services are reasonably worth from the debtor.

ISSUE.—An appearance of record would be *prima facie* evidence of the liability of the person for whom the attorney appears; but such *prima facie* evidence may be overcome by other proof, and the liability of another person established for a reasonable compensation; and it would be no contradiction of the record to show that such attorney was, in fact, employed by some other person, or that the services were in fact for the benefit of another.

JUDGMENT FOR GOLD COIN ERRONEOUS.—A verdict and judgment for gold coin expressly is erroneous.

APPEAL from the District Court of the First Judicial District, State of Nevada, Storey County, Hon. R. S. MESICK residing.

The facts are fully stated in the opinion of the court.

Mitchell & Hundley, for Respondents.

(1.) 1 Nev. 573.

Opinion of the Court—Lewis, C. J.

Perley & De Long, for Appellant.

[*605] *By the court, LEWIS, C. J.:

This action was brought to recover the sum of one thousand and thirty-seven dollars, claimed to be due from the defendant for legal services alleged to have been rendered for him at his request.

There was no express contract between the parties, nor was there any promise by the defendant to pay any sum of money whatever for the services rendered, independent of the legal presumption which would arise from the request by the defendant and the rendition of the service by the plaintiffs. The services claimed to have been rendered for the defendant consisted of counsel, as attorneys, given him with respect to his business, and also the drawing up and preparing certain confessions of judgment by the defendant in favor of some of his creditors. The testimony introduced at the trial may be briefly summed up as follows: "The defendant, who was a merchant in the city of Virginia, being in failing circumstances, called upon the plaintiffs, who were practicing lawyers, to consult with them as to the best means by which he could extricate himself from his financial embarrassments. After some consultation, the defendant, following the advice of the plaintiffs, concluded to confess judgment in favor of his brother, S. Bromberger, who was a creditor, residing in California, and also in favor of his bankers, Paxton & Thornburgh, who were doing business in the city of Virginia. At the suggestion of the plaintiffs, a power of attorney was sent to them by S. Bromberger, authorizing them to take the confession of judgment in his favor. The plaintiffs appeared as attorneys of record for him, and also for Paxton & Thornburgh, in obtaining the confession of judgment.

It is, however, stated by the witness Mitchell, that though he and his partner appeared as attorneys of record for these creditors of the defendant, they acted under the directions of the defendant exclusively, and for his benefit.

The witness Mace also testified that the defendant in-

ned him that he had employed the plaintiffs in preparing the *confessions of judgment, and that [*606] was willing to pay them a reasonable fee.

Other witnesses testified that the services rendered by the plaintiffs were reasonably worth the sum of one thousand dollars.

The case having been submitted to the jury, a verdict was turned in favor of the plaintiffs, for the sum of six hundred dollars in gold coin of the United States.

From the judgment rendered upon this verdict and the order refusing a new trial, the defendant appeals.

It was claimed in the court below, and the point is also made here, that the plaintiffs having acted for the creditors, and appeared as attorneys of record for them in preparing the confessions of judgment, cannot recover compensation for such services from the defendant, because it is said no man can be attorney upon both sides of a case, and the record estops the plaintiff from denying that the services are rendered for the creditors and not for the defendant. Though much stress is laid on the fact that the plaintiffs are claiming pay from the defendant for services rendered in matters where they appear upon the record to have rendered them for other parties and not for him, the real question in the case is, for whom in fact were the services rendered, or who employed plaintiffs to render them? If it can be satisfactorily shown that the defendant was the real party in interest, or employed the plaintiffs in the case in which judgment was confessed, he would be holden to them for a reasonable compensation for such services. The appearance of record as the attorneys of S. Bromberger and Paxton & Thornburgh, is certainly strong evidence tending to exonerate the defendant from any liability; for *prima facie* the person for whom an attorney appears is holden for his fees. Such evidence, however, might be overcome or explained away by other proof, and it would be no contradiction of the record to show that such attorney was in fact employed by some other person, or that the services were in fact for the benefit of another. The record in those cases might estop plaintiffs from denying that they appeared as

Points decided.

counsel for S. Bromberger or Paxton & Thornburgh, but it would not estop them from showing that the defendant was the real party in interest, or *that he employed them to appear for these parties and become responsible for their fees.

Whether the evidence in this case was sufficient to overcome the presumption raised by the plaintiffs' appearance of record for the creditors of the defendant, it is unnecessary to determine. We conclude, however, that they would not be estopped from showing that the defendant is responsible for services so rendered. We do not consider it necessary at this time to pass upon the sufficiency of the complaint in this case, but to avoid all question hereafter it would, perhaps, be well to add an allegation to the effect that the services rendered were reasonably worth the sum claimed.

But there is a fatal objection to the verdict and judgment in this case as they now stand. This court has just decided that the specific contract act is null and void.

The judgment, which was for gold coin, is therefore erroneous, and must be reversed. Ordered accordingly.

CELIA GOLDMAN ET AL., RESPONDENTS, v. J. C. CLARK
ET AL., APPELLANTS.

[1 NEVADA, 607.]

HOMESTEAD—HOW DEDICATED.—Erecting a house and residing therein with one's family dedicates that building as a homestead. It makes no difference that the house erected is large or suitable for a lodging house and used for such purpose.

IDEM—HOW DIVESTED.—Being once dedicated as a homestead, it can only be divested of that character by the joint deed of husband and wife.

IDEM—CLAIM OF, HOW MADE.—The statute which requires the owner of the property to make his claim of homestead is merely directory, and if the husband does not make such claim and point out the homestead property to the officers when it is levied on, the wife may do so.

IDEM—RIGHTS OF WIFE.—The Constitution and the law have given the wife certain rights; the failure of the legislature to point out the particular manner in which she shall assert them is immaterial. She may come into a court of equity according to the established forms and usages of that court, and obtain any equitable relief to which she is entitled.

APPEAL from the District Court of the First Judicial District, State of Nevada, Storey County, Hon. R. S. BECK presiding.

**Williams & Bixler*, for Appellants.

[*608]

Quint & Hardy, for Respondents.

By the Court, BEATTY, J.:

J. C. Clark, as sheriff of Storey county, levied an execution on certain real estate, which respondents claimed as a homestead. Clark refusing to suspend proceedings under the execution and levy, respondents (M. Goldman and his wife Celia) filed their bill praying the court to enjoin Clark from further proceedings thereunder.

The facts shown by the pleadings and proof are as follows: Plaintiffs have been married and living together as husband and wife since 1854. In 1861 they purchased a lot in Virginia city and built a house upon it. This house was burned in the year 1863, and another house erected on the same premises in the fall of that year. Both of these houses were of considerable magnitude, and constructed so as to be more suitable for a boarding or lodging house than a mere residence. Plaintiffs lived in these houses, occupying a portion of the rooms for a family residence, but letting out much the larger portion to lodgers. For a period of several months they rented out the entire premises to another person, to keep as a lodging house, but were again occupying the premises as a lodging house and residence when the levy was made. In the fall of 1864 M. Goldman executed a deed of trust to one ———, for the property, to be held in trust for the sole use of his wife, Celia. The wife was named as the beneficiary in this deed, but was not otherwise connected with it; she neither signed, acknowledged, or in any otherwise, became a party to it than by silent acquiescence. The property when levied on was worth less than five thousand dollars.

The court below enjoined the sheriff from further proceedings, and he appeals.

Opinion of the Court—Beatty, J.

Appellant makes a great many points in this case, some of which it will not be necessary to notice, as the views we are about to express will settle the entire controversy.

First, we think the facts set forth sufficiently [*609] show the *property was dedicated as a homestead.

We have fully expressed our views as to what is included in the homestead, in the case of *Clark v. Shannon*. That opinion is referred to as settling this branch of the case.

The decisions from Michigan on their statute, are totally inapplicable to our statute. The Michigan statute was framed, apparently, with a view to protect the family residence, without any regard to extent or value; ours, to protect five thousand dollars' worth of land and improvements, including the family residence. There is no similarity in the two acts.

The homestead act of 1861 provides that no alienation of the homestead without the signature and acknowledgment of the wife shall be valid, and a married woman can only consent according to prescribed forms.

She is incapable of contracting or assenting to any contract except in the manner specially prescribed by law.

If, then, the property in controversy was the homestead of the parties under the act of 1861, and there has been no law since passed changing its character, it must remain so until it is alienated by the joint conveyance of husband and wife, executed in accordance with that act. As the wife never signed or acknowledged any conveyance, the deed of the husband was a mere nullity, at least as far as it affected her rights to the homestead. And the fact that the husband rented out the premises for a period as a lodging house can make no difference to her. Nothing but her own deed, properly acknowledged, could divest her rights.

But it is contended that the Constitution in effect repeals and destroys the act of 1861, and that no rights can be asserted under that act.

The Constitution provides by section 2 of the schedule as follows:

"All laws of the territory of Nevada in force at the time

Opinion of the Court—Beatty, J.

if the admission of this state, not repugnant to this Constitution, shall remain in force until they expire by their own limitation or be altered or repealed by the legislature."

Then this law remains in force unless there is something in other sections of the Constitution repugnant hereto. We are *told that we will find such repug- [*610] ant matter in section 30 of article IV. That section reads as follows:

"A homestead, as provided by law, shall be exempt from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife when that relation exists; but no property shall be exempt from sale for taxes, or for the payment of obligations contracted for the purchase of said premises; or for the erection of improvements thereon; provided the provisions of this section shall not apply to any process of law, obtained by virtue of lien given by the consent of both husband and wife; and laws shall be enacted providing for the recording of such homestead within the county in which the same shall be situated."

To make out a repugnance between the law of 1861 and this section, it is first assumed that the expression, "A homestead as provided by law," means a homestead to be provided by some future law, and if that does mean a homestead to be provided by some future law, then it precludes the possibility of any homestead being protected by any past law. This is not the language of counsel, but we think embraces the whole idea. In the first place, we are not very positive that the assumption is warranted.

When the Constitution was adopted, there was a statute of the territory exempting homesteads from forced sale. Was it not the intention of the framers of the Constitution to say that that law, or some one similar to it, should always remain a part of the statute law of the state? But admitting that this language refers to a future law, then it amounts to a requirement or command laid on the legislature to pass a law exempting homesteads from forced sales. The section also prescribes what some of the provisions of the homestead law shall be. But it leaves many

Opinion of the Court--Beatty, J.

details to future legislation. If it requires *future* action of the legislature to provide what a homestead shall be, then this section of the Constitution is inoperative to protect homestead until such act is passed.

It appears strange to us that it should be contended that this clause of the Constitution is legislation so complete covering the whole ground of homestead exemption as to suspend all former laws on this subject, and [*611] the same time that it is so *incomplete* as to be wholly inoperative. When the subject of one statute is embraced within another and later statute, it is said the latter repeals the former by implication. It would, perhaps, be more correct to say that it superseded the former.

If, then, the Constitution by its own terms exempts homestead from forced sale, it may be said *in part* at least to supersede the act of 1861, leaving only such portions of that act in force as relates to extent of homestead, matters of practice, etc., which are not provided for in the Constitution. But if the Constitution did not take effect in regard to homesteads, until the legislature passed the required law, then the old act was not superseded until the new one went into effect and this property was protected alike under the old or new law.

The objection that M. Goldman could not bring this suit because he has sold his title, and Celia Goldman because she is not, and never was, the owner of the property, is rather technical. In the first place, if the deed is invalid, has M. Goldman conveyed anything?

But admitting, for the argument, he was, and is estopped from asserting his own claim to the homestead, that cannot divest the wife's claim. It is true that the statute says that the owner of the property shall make the claim of homestead when levied on. But this is merely directory.

If the husband refuses to assert the homestead claim, and point out to the officer what he claims, this would not prevent the wife from asserting her claims.

If the Constitution and the law has given her certain rights, the failure of the legislature to prescribe the partic

Opinion of the Court—Beatty, J.

ular manner in which she shall proceed to enforce them, cannot deprive her of these rights. She may come into a court of chancery, according to the established forms and usages of such courts, and obtain any equitable relief to which she is entitled.

C. W. FOX, RESPONDENT, v. BARSTOW & GOODMAN,
APPELLANTS.

[1 NEVADA, 612.]

APPEAL from the District Court of the First Judicial District, State of Nevada, Storey County, Hon. RICHARD RISING presiding.*

By the Court, BEATTY, J.:

The only question in this case is, can the courts of this State enter up a judgment against a defendant, requiring him to satisfy the same by the payment of gold coin.

We have fully settled this question in the case of *Milliken Brothers v. Charles O. Sloat*. Upon the authority of that case the court below is directed to modify the judgment in this case, by striking out all that part of it which relates to the payment of gold coin.

The appellants must have their judgment for costs in this court, and it is so ordered.

LEWIS, C. J., did not participate in this decision.

*Judgment for gold coin erroneous.

Opinion of the Court--Beatty, J.

WM. SIGISMUND, RESPONDENT, v. NICOLA TROIANOVICH AND SAMUEL MORRIS, APPELLANTS.

[1 NEVADA, 612.]

APPEAL from the District Court of the Ninth Judicial District, State of Nevada, Esmeralda County Hon. J. H. CHASE presiding.*

By the Court, BEATTY, J.:

In the application for a new trial in this case two points are made in the court below. One that the court erred in refusing a continuance on the application of defendants; the other, that the judgment was erroneous in being entered up for gold coin. The latter point only is discussed in appellants' brief.

[*613] *We are not satisfied that the defendants showed sufficient diligence in trying to obtain the testimony of absent witnesses.

We will not, therefore, interfere with the ruling of the court below on this point.

So far as the judgment is for gold coin, it is erroneous, as we have held in the case of *Milliken Bros. v. Sloat*. On the authority of that case the court below is directed to modify its judgment by striking out all that part of the judgment which relates to gold coin.

The appellants will recover their judgment for costs in this court.

LEWIS, C. J., did not participate in this decision.

(*) Judgment for gold coin erroneous.

Opinion of the Court—Lewis, C. J.

F. HASTINGS, APPELLANT, v. J. NEELY JOHNSON,
RESPONDENT.

[1 NEVADA, 613.]

UTION MUST BE AUTHORIZED BY THE JUDGMENT.—The execution must be authorized by the judgment, and must follow it in every essential particular, not only as to material matters of form, but also as to the amount for which it is rendered.

1.—WHEN SALE UNDER EXECUTION WILL BE SET ASIDE.—If the execution is issued for an amount materially in excess of the judgment, a levy and sale made to satisfy such excess is nugatory and will be set aside upon the application of any person interested, or whose rights have been prejudiced thereby.

2.—When but one sale of property is made under such an execution and an amount materially exceeding the judgment is realized, the entire proceedings under it are nugatory. But when several levies and sales are made for separate sums, only such sales or levies will be considered void as are made to satisfy the amount in excess of the judgment.

3.—When the discrepancy between the judgment and the execution is a mere trifle, levy and sale will not be disturbed, but when it is material it cannot be overlooked.

4.—Only the original claim or demand draws interest after judgment. When, therefore, an execution is issued directing the collection of interest on the interest included in the judgment, and a sale of property is made to satisfy such excess of interest, the sale is nugatory, even against a *bona fide* purchaser.

APPEAL from the District Court of the Second Judicial District, State of Nevada, Hon. S. H. WRIGHT presiding.

The facts sufficiently appear in the opinion.

Thos. H. Williams and Alwater & Flandreau, for [*614] appellant.

Nayton & Clark, for Respondent.

By the Court, LEWIS, C. J.:

The proposition we think well settled that the execution must be authorized by the judgment and must follow it in every essential particular, not only as to material matters of form, but also as to the amount for which it is rendered.

If the writ is issued for an amount materially in excess of the judgment, a levy and sale made to satisfy such

Opinion of the Court—Lewis, C. J.

excess is nugatory and will be set aside upon the application of any person interested, or whose rights have been prejudiced thereby.

When but one sale of property is made under such an execution, and an amount materially exceeding the judgment is realized, the entire proceedings under the writ are nugatory.

When several levies and sales are made for separate sums, only such sales or levies would be considered void as are made to satisfy the amount in excess of the judgment;

for, though the execution direct the collection of a [*615] sum exceeding that *authorized by the judgment,

sales made under it to the amount actually due upon it will be valid, and only such proceedings as are subsequently taken will be nugatory. In such cases the error may be corrected without setting aside or declaring nugatory the entire proceedings under the execution. If, however, but one sale is made to satisfy the sum actually due and the excess, the error can only be remedied by setting aside and declaring void the entire proceedings under the execution. Such seems to be the rule established by the authorities. (*Knight v. Applegate's Heirs*, 3 Monroe, 336; *Peck v. Tiffany*, 2 Comst. 458.) In the first of these cases an execution was levied for about forty-two dollars more than the judgment authorized, and the court for that reason held that the sale bond could not be sustained. Judge Owsley, who delivered the opinion of the court, after holding that the execution was not void, proceeded to say: "But it does not follow that the sale bond should be sustained. To uphold a sale of land made under execution by an officer, it is not enough that the execution purports upon its face to be regular and appears to have emanated from competent authority; there must also be a judgment to which the sale money is to be applied. The reason is obvious. Lands are made subject to sale under writs of *faciendum* by statutory enactment, and it is only in satisfaction of judgments that the statute has authorized the sale, there must of course be a judgment to which the proceeds of the sale may be applied to make the sale a valid one.

t would, therefore, judging from the facts proved on the trial of the motion, seem to follow that the sale bond cannot be sustained, for the land appears to have been sold and the bond taken for a sum equal to that mentioned in the execution which issued in favor of *Knight against the Estate of Applegate*, and as the judgment in favor of Knight is in fact far less than the execution, there is no judgment to which the excess contained in the execution and included in the bond can be applied." That an execution issued and sale of property made, where there is no judgment authorizing it, would be utterly void, there can be no doubt, and for the same reason we think an execution and sale for a sum exceeding that actually due upon the judgment would be equally *void, because there is no judgment to authorize the collection of the excess for which execution is issued. When the discrepancy between the judgment and the execution is a mere trifle, levy and sale will not be disturbed, because it is said *Lex non curat de minimis*; but when the discrepancy is material, it cannot be overlooked or disregarded by the courts.

The first judgment in these cases was entered on the 28th day of June, A.D. 1864, for the sum of eight thousand five hundred and forty-five dollars and seventy-six cents, which included the sum of nine hundred and forty-five dollars and seventy-six cents interest. Upon this judgment an execution was issued directing the sheriff to collect that sum with interest thereon at the rate of ten per cent. per annum from the time of its rendition. The sale of the defendants' mill under it occurred on the first day of March, A.D. 1865, about eight months after the entry of judgment.

By this means, interest for the period of about eight months was collected on the nine hundred and forty-five dollars and seventy-six cents interest included in the judgment, which amounted to the sum of sixty-one dollars and sixty-eight cents. The same error occurred in the execution issued in one of the judgments rendered on the 27th day of December, A.D. 1864, by which about seventeen dollars more than was authorized by the judgment was collected, making on the two executions about seventy-eight

Opinion of Beatty, J., concurring.

dollars more than was actually due on the judgments. Section 5, p. 100, of the statutes of 1861, expressly declares that only the original claim or demand shall draw interest after judgment. These executions direct the sheriff to collect interest on interest, and the sale was made for an amount sufficient to satisfy the execution, and was therefore void. The sale was made as much to satisfy the seventy-eight dollars for which execution illegally issued as for that which was actually due. Had there been only sufficient property levied on and sold to discharge the amount legally due on the judgment, the sale would doubtless be sustained, and only subsequent levies and sales made to satisfy the excess would be nugatory. But here the seventy-eight dollars for which execution was improperly [*617] issued is inseparable from the *balance, for both enter into the same sales, or rather one sale was made to satisfy the legal and illegal demand.

The protection which the law extends to *bona fide* purchasers at judicial sales will not avail the purchaser in this case, for we consider the sale not merely voidable but absolutely void, and in such cases the sale will be set aside, even though the rights of *bona fide* purchasers have intervened.

Many other points are made by respondent to sustain the order of the court below, none of which, however, we think tenable, nor necessary to be passed upon at this time.

The order of the court below must be affirmed.

By BROSNAN, J., concurring.:

The judgment of affirmance is correct. In my opinion, however, an execution calling for payment of interest upon the aggregate amount of a judgment is not authorized, where (as in this case) the judgment of the court is silent as regards the collection of interest. The judgment-record should itself declare what the law allows.

By BEATTY, J., concurring:

I fully concur in the judgment, and also in the views expressed by the chief justice, in this case, with one exception. He thinks the sale was for some seventy-eight dol-

Opinion of Beatty, J., concurring.

ore than was actually due on the judgment rendered. Opinion is that the sale was for some six hundred and y-five dollars in excess of the judgments.

se judgments were rendered on notes, and the judgments entered of record called for so many dollars withholding anything about interest. When the clerk issued execution he directed the sheriff to make out of the debtor's property the amount of the judgments and interest, at the rate of ten per cent. per annum, from the day the judgments were rendered until paid. This the two executions would amount to about six hundred and seventy-five dollars. Our statute, in regard to it, contains the following clauses: "When there is no express contract in writing *fixing a [*618] rate of interest, interest shall be allowed at the rate of ten per cent. per annum for all moneys, after they become due, on any bond, bill or promissory note, or on any instrument of writing, on any judgment recovered in any court in this territory, for money lent, for money on the settlement of accounts from the day on which the balance is ascertained, and for money received to the use of another."

parties may agree in writing for the payment of any interest whatever on money due, or to become due, by contract. Any judgment rendered on such contract shall conform thereto, and shall bear the interest agreed upon by the parties, and which shall be specified in the judgment; *provided*, only the amount of the original claim shall be paid, and shall draw interest after judgment."

The chief justice thinks, that under the provisions of section four, when a judgment omits to say anything about interest, the clerk may, as a matter of course, without the order of court, issue execution for the amount of the principal named and legal interest, for the reason the statute provides that the judgment shall bear ten per cent. interest, when there is no writing to show it must draw a different interest, and the only error in the execution in this case is in giving compound interest, or interest upon interest, which is expressly prohibited in section five. My

Opinion of Beatty, J., concurring.

opinion is, the execution must follow the judgment, and if the judgment does not call for interest the execution cannot.

If the clerk can issue execution for interest not mentioned in the judgment, then he must go behind the judgment to see what the rate shall be.

First. He must go behind the judgment to see that he does not issue his execution for compound interest, for that is expressly prohibited by statute.

Then he must go behind the judgment to see what was the rate of interest agreed on in the original contract, out of which the judgment arose, for that rate of interest may have been more or less than ten per cent. per annum.

Suppose the judgment was on a note bearing interest at five per cent. per annum, the creditors would not be entitled to ten per cent. per annum. If, on the other [*619] hand, the note was *for five per cent. per month, he would, if entitled to any interest, be entitled to more than ten per cent. per annum. Besides, it is sometimes a contested point as to what was the rate of interest agreed on.

I remember to have seen one case tried in California where the whole contest was, whether the note was to bear interest at ten per cent. per month or ten per cent. per annum. Had the court failed to enter judgment for any interest, could the clerk have determined what rate of interest the execution should bear?

In my opinion, the execution must follow the judgment. The clerk cannot go behind the judgment to see whether a part or the whole of the judgment is to bear interest, nor to see what rate of interest it is to bear.

Opinion of the Court—Beatty, J.

**T. HENRY, RESPONDENT, v. THE CONFIDENCE
GOLD AND SILVER MINING COMPANY, AP-
PELLANTS.**

[1 NEVADA, 619.]

STATUTE OF LIMITATIONS—RIGHTS OF MORTGAGEE AFTER DEBT IS BARRED.—
When a debt secured by mortgage is barred by the statute of limitations,
the mortgage is not thereby extinguished.

M.—Even when all action or legal proceeding on the mortgage is barred,
still if the mortgagee gets rightful possession of the premises mortgaged,
he may retain the same until his debt is paid.

M.—The statute of limitations provides a limitation of six months to the
maintenance of an action on contracts for the payment of money made
out of this state. But the same statute would only bar an action to
foreclose a mortgage executed on property within this state to secure
such debt after the lapse of four years.

APPEAL from the District Court of the First Judicial Dis-
trict, State of Nevada, Storey County, Hon. R. S. MESICK,
sitting.

Hilger & Whitman, for Appellants.

Williams & Bixler, for Respondent.

*By the Court, BEATTY, J.:

[*620]

In August, 1862, Irwin, J. B. Henry and others, at the
City of Nevada, State of California, executed two promis-
sory notes, each payable twelve months after date, to T. W.
Gourney and A. D. Tower, and to secure the payment of
said note, Irwin, one of the makers, on the same day ex-
ecuted his mortgage on certain mining ground in Storey
County, Nevada, which was shortly after duly recorded.

In July, 1863, Irwin made a deed of the same mining
ground to the defendant, a mining corporation, upon con-
dition that they would issue stock to him, or his assignees,
and the ground thus conveyed.

Subsequently he transferred his right to the stock to the
present defendant, S. T. Henry. Henry demanded the
stock from the corporation, and the proper officers thereof
refused to issue it to him, on the ground that the mortgage

Opinion of the Court—Beatty, J.

is still outstanding. His reply to that objection is that the debt is barred by the statute of limitation. That he is entitled to the stock just as he would be if the debt was paid or otherwise extinguished. The only point made in the argument by counsel is whether the statute of limitation completely bars all remedy for the collection of this debt. Sec. 16 of an act of the territorial legislature, approved in November, 1861, provides among other things as follows: ‘

“Actions other than those for the recovery of real property can only be commenced as follows: * * *

Within four years an action upon any contract, obligation or liability founded upon an instrument of writing, except those mentioned in the preceding section.”

Section 34 of the same act, as amended in December, 1862, reads as follows:

“An action upon any judgment, contract, obligation or liability, for the payment of money or damages, ob-
[*621] tained, *executed or made out of this territory, can only be commenced within six months from the time the cause of action shall accrue.”

We are referred to the decision of the California supreme court in the case of *Lord v. Morris*, 18 Cal. 484, to sustain the proposition that the debt being barred by the statute of limitation, the mortgage is in effect extinguished. On the other hand we are referred to a decision of the circuit court of the United States for the northern district of California (*Sparks & Kelsey v. Pico*, 1 McAllister, 497), as establishing a contrary doctrine. It is claimed that this latter decision is sustained both by reason and authority.

Chief Justice Field, in his decision, expressing the views of the supreme court of California, puts the case on one distinct ground, and rather intimates that he would arrive at the same conclusion upon another and different ground. The first is that the statute of California limits equity suits in the same manner that it limits actions at law. And if there is an express statutory limitation to the time within which bills of foreclosure may be filed, and that time has expired, then no such bill can thereafter be maintained.

We think he clearly shows that in all those cases where

Opinion of the Court—Beatty, J.

s of equity have entertained bills to foreclose mortgages after the debt was barred by the statute of limitation, as been in England or in states where there is no express statutory limitation of suits in equity. Such decisions could not be held as authority for disregarding the express letter of the California statute. We are of opinion that so far as this branch of the case goes, the same court of California was right, and the circuit court in error in the views expressed in *Sparks & Kelsey v.* But the supreme court of California have gone further, and intimated, perhaps, or at least it is claimed the effect of their decision is that the mortgage is mere incident to the debt, and when the debt is barred by statute of limitation that the mortgage is, if not absolutely extinguished, at least rendered unavailable for any purpose. To such a doctrine we are not ready to assent. An action upon the note may be barred by one clause of the statute and a proceeding to foreclose the mortgage another.

After a very slight examination of the authorities, we [*622] think, will convince any one that after an action at law upon the debt is barred, the mortgage may still have an existence for some purposes. At an early day it was held in England that when the debt was barred by the statute of limitation it was extinguished. But afterwards it was held that the statute of limitation did not destroy the debt, but only took away the remedy. In the authorities cited in 1 Allister (p. 497), it seems to be well settled by modern decisions, that if goods are delivered to a creditor as security for debt, they remain rightfully in his hands after the debt is barred by the statute. So, too, if land is mortgaged to secure the payment of a promissory note after the note is barred, or rather after an action at law on the note is barred by the statute of limitation, the party may maintain his action of ejectment for the land mortgaged, or file a bill in equity. (See the authorities collated in 1 McAlister above cited.)

and in New York, where they have a statute similar to that of California and of this state, confining the remedy of

Opinion of the Court—Beatty, J.

the mortgagee to foreclosure and sale, and denying him the right to bring ejectment, still, if he gets possession of the land mortgaged, rightfully without fraud or force, he may maintain that possession against the mortgagor or those claiming under him. (See *Van Dyne v. Thayer*, 14 Wend. 233, and *Phyffe v. Riley*, 15 Wend. 248.) And doubtless on the same principle that the party who holds goods in pledge for a debt may retain those goods even after an action at law upon such debt has been barred, the party who has got rightful possession of land mortgaged may retain possession thereof until his debt is paid, although he can bring no action to enforce the debt.

By the terms of the 34th section of the act limiting the time for bringing actions on contracts for the payment of money made out of the state, an action against the makers of the promissory note mentioned in the complaint was barred before the commencement of this suit. But a mortgage in the usual form is not an obligation to pay money. It is usually a conveyance of certain property as a security for the payment of a certain debt. But the debt secured may be due from a party totally different from [623] the one who executes the mortgage. A may contract to pay B a certain debt; O may mortgage property as a security for the performance of A's contract. In this very case there are four parties who contract the debt, only one of the four executes the mortgage. The mortgage, then, if in the usual form, is not a contract on the part of Irwin to pay money, but a deed given by Irwin as a security that himself and the others will pay money. We think whilst an action on the note would be barred by the 34th section, a bill to foreclose the mortgage would not be barred until four years had elapsed since the cause of action arose thereon. In such foreclosure, perhaps, the plaintiff would be confined to a decree of sale, and there might be no authority for a judgment for any surplus not paid by the proceeds of the sale.

This renders it unnecessary to determine another point which suggested itself to our mind. Could the plaintiff come into a court of equity and ask such affirmative relief

Points decided.

the plaintiff asks here whilst acknowledging that the property for which the property was pledged remains unpaid. The statute of limitation is a statute of repose, a statute to protect defendants, not to afford new causes of action to plaintiffs. But it is not necessary to discuss this point. The views expressed on the other branches of the case must determine the controversy.

Judgment is reversed and set aside, and the court below is to make such order in the case as may be proper and in accordance with the views expressed in this opinion.

C. CHASE, APPELLANT, v. THE SAVAGE SILVER MINING COMPANY, RESPONDENT.

[2 NEVADA, 9.]

PRINCIPAL AND AGENT.—Every written contract made by an agent, in order to be binding upon his principal, must purport, on its face, to be made by the principal, or the intent to bind him must appear in the instrument itself.

LOCATING CLAIMS—LOCATORS OF, TENANTS IN COMMON.—After notices of location were posted and recorded, and the limits of the mine determined, all the locators became tenants in common. The acting locators could not dispose of the interests of their co-tenants.

CONTRACTS—WHEN MUST BE SIGNED BY BOTH PARTIES.—If a contract is drawn between the several locators of a mine and certain prospectors to give a part of the ground for developing the mine, and signed by part only of the locators, if the prospectors go on to work, it is at their own risk. Those not signing or consenting to the contract are not bound.

***APPEAL** from a judgment of the District Court of [*10] the First Judicial District, the Hon. CALEB BURBANK presiding.

The facts are stated in the opinion.

Perley & De Long, James F. Hubbard and J. M. Nougues, for Appellant.

Crittenden & Sunderland, and Hillyer & Whitman, for Respondent.

Opinion of the Court—Lewis, C. J.

By the Court, LEWIS, C. J.:

This action was brought to recover an interest of sixty-six and two-thirds feet in the Savage Silver Mining ground, of which plaintiff claims he is unlawfully deprived by the defendant.

The established facts material to the issue are substantially as follows: On the 4th day of July, A. D. 1859, L. C. Savage and H. Carmack located the ledge now claimed by the defendant, for themselves and four others, among whom was the plaintiff. At the time of such location the plaintiff was residing in the state of California, and knew nothing of the location. On the 9th day of July, five days after the limits of the claim were defined, and the notice of location was recorded, a contract was drawn up in form between R. Crall, C. C. Chase, H. Carmack, W. Sturdevant, L. C. Savage, and A. O. Savage, the locators, as parties of the first part, and J. McFadden, W. W. Caperton, J. B. Endicott, Samuel Baird, Elisha McCurdy, and — Hall, as parties of the second part, by the terms of which the [*11] parties of the second part agreed to *prospect the mining location above referred to “until they struck pay dirt,” and in consideration thereof one-half of the entire claim was conveyed to them.

This instrument, though drawn up in form for execution by all the parties, was only signed by L. C. Savage, and H. Carmack, on the one side, and W. W. Caperton and J. McFadden on the other. There is not a syllable in the contract from which it can be inferred that the parties who signed it intended to act for or as the agents of the others; but as it is presented to us, appears to be an instrument incompletely executed, being signed only by four out of twelve who are named as parties to it. The plaintiff, Chase, was not informed of his interest in the claim until a month or two after its location and the execution of the contract above referred to. In November following he came to Nevada, and then, for the first time, he was shown the contract.

He at once declared to Mr. Savage, who showed it to him,

Opinion of the Court—Lewis, C. J.

his name was not signed to the contract, and that he not consider himself bound by it. Savage replied that he did not suppose he was.

At that time several ineffectual efforts were made by Savage and Chase to find the prospectors; but the plaintiff returned to California without having seen any of them. No work had been done on the claim by them at that time, but they did not appear to have been at work whilst the plaintiff was there in November.

The interest of each locator consisted of one hundred and thirty-three and a third feet. In December, A. D. 1859, the plaintiff conveyed away one half of his interest, which, he is not holden upon the contract entered into by Savage and Carmack, leaves about sixty-six feet to which he is still entitled, and to recover which this action is brought.

The prospectors, Baird and his associates, treating the tract as a conveyance *in presenti* to them of one half of the entire ground, conveyed their respective interests to persons from whom the defendant claims title and the right of possession.

Before the bringing of this action the mine had been developed by the defendant at a vast expense, and valuable and costly improvements had been placed upon the ground, whilst the plaintiff remained quiet and gave no notice of his claim.

Upon this state of facts it is urged, [*12] on behalf of the defendant, that Savage and Carmack, in executing the contract, acted as the agents of the plaintiff, and that he was therefore bound by it; that he could not accept his interest in the mine and repudiate the contract made for the purpose of developing it; and that in adopting the acts of his agents in the location, he also adopted their subsequent acts with respect to the development and working of it—for it is said a principal on whose behalf an unauthorized agent assumes to act, cannot ratify part of the transaction without ratifying the whole.

Adopting this view of the case, the court below, among any other instructions bearing upon the same point, charged the jury as follows: "If you find that L. C. Savage made the location for the plaintiff, and then made the con-

Opinion of the Court—Lewia, C. J.

tract in good faith toward the plaintiff, and that the knowledge of the location and of the contract came to him at the same time, then the adoption of the location would be the adoption of the contract."

Whether this instruction would be proper, if Savage or Carmack had assumed to act as the agent of Chase in executing the prospecting contract, as they did in locating the ground, need not be determined in this case, for there is nothing either in the contract itself or the evidence offered at the trial, from which it can be inferred that they even intended to act for him in executing it. So the argument of counsel for respondent rests upon a false premise in that respect, and the conclusion must necessarily be incorrect. If Savage had signed the contract for Chase as his agent, or if there was anything in the contract itself by which it might appear that it was intended to bind him, there might be some ground for claiming that he is holden upon it. Nothing of the kind, however, appears. It is simply a contract in form between the parties, and signed only by four of the number for themselves. There is nothing in the contract by which we can even presume that Savage or Carmack had any intention whatever of acting for the plaintiff. But if it be admitted that they did in fact so intend, that would not be sufficient without the legal steps being taken to accomplish their object. As stated by Justice Bronson, in

Townsend v. Corning (23 Wend. 441): "It is not [*13] enough that a man intends to do a *legal act, unless he uses the legal means for accomplishing his object."

So in this case Savage and Carmack may have intended to act as the agents of the plaintiff in the execution of the contract, but as they have not manifested that intention in legal form, it is of no consequence. Indeed, it is a well established rule that every written contract made by an agent, in order to be binding upon his principal, must purport on its face to be made by the principal, or the intent to bind him must appear in the instrument itself. (*Williams v. Christie*, 10 How. P. Rep. 12; *Stanton v. Camp*, 4 Barb. 274; *Townsend et al. v. Corning*, 23 Wend. 435; *Evans v. Wells*, 22 Wend. 324; *Townsend v. Hubbard et al.*, 4 Hill, 351; *Mc-*

Opinion of the Court—Lewis, C. J.

malid et al. v. Bear River Co., 13 Cal. 235). In the case *Williams v. Christie*, above cited, the contract was one for the sale of certain real property in New York, and purported to be made between Jane Christie, Stephen L. Preston and Margaret Ann, his wife, Levi H. Truex and Mary Jane, his wife, of the first part, and the plaintiff, Williams, of the second part. The wives of Preston and Truex were present when the contract was drawn up, but the instrument was only signed by Jane Christie, Preston, Truex and Williams, and the supreme court of New York held the contract wholly void as to those who had not signed it. In delivering the opinion, Justice Bronson says: "The signatures of the husbands of Mrs. Preston and Mrs. Truex do not purport to have been made in behalf of or as agents of their wives. There is nothing on the face of the agreement which intimates that they are agents, or that they assumed to act as agents for their wives in signing it. We consider the doctrine well settled that every written contract made by an agent, in order to be binding upon his principal, must purport on its face to be made by the principal, and must be executed in his name and not in the name of his agent." The instrument in this case was not under seal, and therefore it was not necessary that the name of the principal should be signed to it, but it is indispensable that it should appear upon its face that it was intended to be made for the principal. After the notices of location were posted and recorded, and the limits of the claim defined, the locators became tenants in common of the ground. They stood in that character at the time the contract was executed by Savage and Carmack. As such *tenants in com- [*14] mon they had a right to dispose of their own interests, but they could in no way dispose of or encumber the interests of their co-tenants.

The contract, therefore, if it be binding upon any one, can only be upon those who signed it. If we should feel disposed to disregard the rules of law, that to make a written contract by an agent binding upon his principal, it must appear upon its face to have been the intention to bind him, and that one tenant in common cannot convey or

Opinion of the Court—Lewis, C. J.

encumber the interest of his co-tenant, and be go solely by the intention of Savage and Carmack, we come to no different conclusions; for there is nothing record showing that they ever intended to act for the locators; but, on the contrary, it seems to have been tention to get Chase to execute the contract for him for Savage says in his testimony that he did not ex was bound by it, unless the locators got him to sig he executed a deed for one-half of the ground. T strument itself is in form the contract of all the parti had it been signed by all would probably have co one-half the ground to the prospectors.

Until it was so signed, however, it was incomple the prospectors could not have been compelled to p their part of it until signed by all the locators. I went on and did the work under it before it was com executed, they did it at their own risk, and cannot now in and claim the same rights under it which they c signed by all the parties. Had all the locators in fa tered into a contract of this kind, and merely neglec sign it, without intending to abandon it, and they per the prospectors to do the work, as if it were com executed, there is, perhaps, no doubt but a specific pe ance would be decreed upon a proper application to a of equity; but surely no court would enter such a against one who had in no way entered into such co either verbally or by writing. If we are correct in th clusion that the instrument was the contract of Sava Carmack only, or that they did not intend to act agents of the plaintiff, there could be no ratificati Chase. There was nothing for him to ratify. Ther been no attempt to act for him in the execution of th tract. So the proposition that the plaintiff cou [*15] adopt the location without also adopting the tract, or rather that he could not accept the b and repudiate the burdens, is answered by the statem the fact that there was no attempt to make the inter Chase subject to the contract, or to impose any b upon it, but it was left for him to do it himself if he

Opinion of the Court—Lewis, C. J.

do so. And there is no law to sanction the position that could not adopt the acts of Savage when he acted as his agent in acquiring certain property, without also adopting similar transactions with respect to that property in which he merely acted for himself. Suppose Savage and Carmack had mortgaged their respective interests in the claim, for the purpose of obtaining money to develop it, instead of entering into this contract, would it be claimed that the plaintiff could not accept his interest in the claim without assuming a certain proportion of the mortgage? Could the mortgagee in such case claim that his mortgage covered Savage's interest as well as the mortgagors? Most certainly not. And yet we can see no difference upon principle between that case and the one at bar.

If he could accept the location in the hypothetical case without assuming the burden of the mortgage, why can he not, in this case, accept his interest in the location without adopting a contract which did not purport in any way to bind him or his interest? True, by its terms one-half of the entire claim was conveyed to the prospectors, but until accepted by all the parties to it, it was either no contract at all, or only the contract of those who signed it.

It was not the intention of Savage and Carmack to convey one-half of the entire claim themselves, but only of their interest in it. The prospectors must have known that fact. The contract itself was evidence of it, and that would appear to be the understanding of all the parties. When signed by only two of the parties, therefore, as stated before, the contract was either a nullity, or it was binding upon those only who signed it. If all those who were to sign it failed to do so, the prospectors, by going on with the work under it, could not increase the liability of those who did sign it. The contract, then, stands precisely the same as if Savage and Carmack had in terms conveyed simply one-half of their interest in the claim. With this view of the case, it is obvious that it was no part of the plaintiff's duty to give the prospectors notice that he was not bound upon the contract, for they had no reason to suppose that he was.

Opinion of the Court—Lewia, C. J.

[*16] *We have examined this case with a sincere desire to find some authority for affirming the judgment of the court below, for we look upon it as one of those cases where the application of the inflexible rules of law operates as a flagrant injustice, which we are loth to sanction.

We have, however, no option but to follow the clear rules of law: for to declare, not to make, the law is the province of the courts. It is a deplorable fact, which we fully realize, that these stale claims, conjured up from the lawless irregularities of a period when legal forms were disregarded, and physical force was the only law recognized by society, have been a blight upon the prosperity of the great dominant interest of this state.

The rules of the common law, though founded in reason and sanctioned by the wisdom of centuries, afford it but a feeble and inadequate protection from the claims of those who shirk the burden and the labor, and emerge only from obscurity to claim the fruit produced by the industry and perseverance of others.

The state should, therefore, protect her mining interests by such wholesome and just legislation as will, in the future, relieve it from the evils which have beset it in the past. Other instructions were given which were erroneous, but we do not deem it necessary to pass upon them, as the principles announced in this opinion sufficiently dispose of them.

Judgment reversed and a new trial ordered.

BEATTY, J., having acted as counsel in this case, did not participate in the decision.

Opinion of the Court—Beatty, J.

**J. MAYNARD, APPELLANT, v. J. NEELY JOHNSON,
RESPONDENT.**

[2 NEVADA, 16.]

APPEAL FROM AN ORDER SETTING ASIDE JUDGMENT BY DEFAULT.—An order setting aside a judgment by default is an appealable order, and if not appealed from, that order will not be reviewed after judgment on the merits.

WRIT—VOID INSTRUMENTS.—When the statute makes an instrument void or invalid it is proper to plead the statute specially.

—When the statute declares certain instruments shall be void, a defendant may plead the facts which make it void, although in so doing he shows a violation of law by himself. It being the [*17] policy of the law to allow such pleas to prevent the violation of the statute.

—WANT OF STAMPS.—The defendant might plead the want of the proper stamps, if such deficiency of stamps rendered the notes invalid.

IF ACT OF CONGRESS CONSTRUED.—The stamp act of Congress does not declare any notes to be invalid for want of the proper stamps, except where omitted for the purpose of evading the law. [Overruled in opinion upon rehearing, *post* 25.]

APPEAL from the District Court of the Second Judicial District, Hon. S. H. WRIGHT presiding.

The facts are stated in the opinion.

George A. Nourse, for Appellant.

J. Neely Johnson and R. M. Clarke, for Respondent.

By the Court, BEATTY, J.:

[*18]

The facts in this case are, that in August, 1864, the respondent signed three several instruments in the form of promissory notes and delivered them to the appellant. When the instruments were delivered it would seem there were revenue stamps placed on them by the maker, nor by one authorized so to do by him. When these notes or instruments were sued on they had attached to them certain revenue stamps, but not of the requisite amount or denomination required by the revenue act passed in June, 1864, which, as to stamp duties, took effect on the 1st day of August, some eleven days before the notes were executed.

Opinion of the Court—Beatty, J.

These stamps were never canceled by the maker of the note. It does not appear, from the transcript, whether they were in any manner canceled. The complaint sets out the note *in hæc verba*. At the end of the first note, which was for two thousand five hundred dollars, payable in ninety days, are the words and figures (U. S. Rev. stamps, 42 cents); at the end of the second note, which was for same amount, payable in one hundred and fifty days, are the words and figures (U. S. Rev. stamps, 89 cts.); at the end of the third note, which was for three thousand two hundred dollars, payable in one hundred and eighty days, were the words and figures (U. S. Rev. stamps, \$1.02). None of these sums were sufficient under the law of June, 1864.

[*19] *Suit was brought on these notes in April, 1865.

The precise day when the summons was served does not appear in the transcript. But on the 1st day of May, 1865, defendant obtained the written consent of plaintiff's counsel that he should have one day further time to demur, answer, or otherwise appear in the case. The next day defendant filed a paper in the case, which is in the form of a written motion asking the court to quash the summons and copy of *complaint* served in the case, on the ground that neither the summons nor certificate of the clerk to the copy of complaint was stamped as required by law.

On the 4th of May plaintiff caused default and judgment thereon to be entered up by the clerk of the court.

On the 11th of May, about one week after judgment had been entered by default, defendant and plaintiff's counsel signed the following stipulation:

"In above action it is hereby stipulated that the motion to quash summons and to set aside default and judgment be submitted to the judge of said court without oral argument, he to decide the same as soon as possible."

On the 15th of May a written motion asking the court to set aside judgment, and also an affidavit setting out facts on which motion was based, were filed by defendant.

The court set aside the judgment by default, but refused to quash the summons. The defendant was given five days to answer. He put in his answer, admitting that he signed

Opinion of the Court—Beatty, J.

d *delivered* the instruments set forth in the complaint. e then sets out the facts in regard to the want of revenue stamps as we have before stated them, and winds up with a denial that he *made* or *executed* the notes or instruments sued on, or that he is indebted thereon, etc.

The plaintiff demurred to this answer; this demurrer was overruled; the parties went to trial; and defendant having proved the facts as stated in his answer, the court gave judgment for him, and the plaintiff appeals.

The first ground taken by the appellant is, that his judgment by default was improperly set aside; that this court could set aside the present judgment and reinstate the former judgment in the case.

The former judgment was set aside at some period between the *15th of May and the 12th of June, [*20] 1865. The appeal, in this case, was taken on the 8th of August, 1865.

It will hardly be disputed that the order setting aside the judgment by default was an appealable order. From that order the plaintiff might have appealed within sixty days, but not after. If this court could not reverse that order upon direct appeal after the expiration of sixty days, it seems to us it would be against all principle to attempt to review it in this appeal from another and distinct judgment. We think the question as to the regularity of the order setting aside the judgment by default cannot now be adjudicated. The propriety of that order involves many questions which we have not examined. Did the filing of a motion to quash the summons bar the right to take a default until that motion was disposed of? If not, was the belief on the part of defendant that it would have that effect sufficient excuse for his not answering or demurring, or getting his time for so doing extended? And should the default be set aside for this reason only? Is the affidavit of defendant in support of motion to set aside default sufficiently explicit as to merits and as to his belief that default could not, or could not, be taken until his motion was disposed of? Does not the complaint itself show that the notes were stamped with United States stamps of insuffi-

Opinion of the Court—Beatty, J.

cient amount; that plaintiff was not entitled to any relief, and therefore justify the action of the court below in setting aside the original judgment? These and several other points have presented themselves to our mind in connection with the order setting aside default and judgment. But, as we think that order is beyond our control at this time, we have not examined these points so as to come to any conclusion. We are not satisfied, by any means, that an error was committed in making that order, and if there was, it is too late to correct it now.

The question as to what was the effect of omitting the proper stamps when the notes were executed, is one far more difficult to determine. The statute itself is by no means clear, and we have not been referred to any English decisions which we think are applicable to the case before us. We have no access to the English statutes on the subject of stamp duties, and therefore are not certain as to their terms; but from recollection of what we have heretofore read, and from expressions in the English decisions *before us, we judge they contained among other provisions the following in substance:

First. Instruments in general not properly stamped, should not be *read in evidence*.

Second. Certain instruments, such as indentures of apprenticeship (and possibly some others) were *absolutely void* if not properly stamped when executed.

Third. Certain commissioners were authorized, in case the stamps were left off of instruments which should have been stamped when issued, to stamp the same upon payment of a penalty by the party wishing to use the instrument.

Fourth. Whilst the commissioners were allowed to stamp most kinds of instruments, they were expressly forbidden to stamp others, such as bills of exchange under one act, policies of insurance under another, etc.

Our statute makes no distinction between different classes of paper. It does not declare that unstamped paper shall not be received in evidence, but that under certain circumstances it shall be "invalid and of no effect."

The English courts have held that a special plea to an

n on an instrument not properly stamped, setting up fact, was not a good plea, because it might be properly ped between the time of filing the plea and the trial of ause. (See Byles on Bills, marginal page 91, and the there cited.) There was doubtless some reason for

The statute does not declare such instrument void or id, but says it shall not be "pleaded or given in evi-e" until stamped. You cannot raise an objection to mce by plea, and the English courts seem to have ed the word "pleaded" as having no force or effect, g in fact mere surplusage. In such case, the defendant led *non assumpsit* or *nil debit*, and where the nature of declaration required it, might plead *non est factum*.

Oh. Pl., vol. 1, p. 483.) At least, such was the prac-under the old rules of pleading in England. What was practice after the adoption of the new rules of pleading r the provisions of the statute 4th of William IV, we mable to say. But when the statute makes an instru-t void, or invalid, which is the same thing, doubtless proper way to avoid it is to plead the statute.

is, to set *out the facts, and aver that the in- [*22] nent is void by reason of the statute. Such is the l and proper defense against a note given for usury, ing, etc., which are made void by the statute. (See 1st . Pl. 484.) And Lord Denman, an able judge, in king of this very subject, says: "It is said, however, stamp acts do not make a bill without a stamp void, but forbid its being received in evidence. That may be so me cases; but the 19th section of Stat. 55, Geo.

184, expressly prohibits the reissuing a bill of ex- ge which has been paid, and inflicts a penalty of £50 ny person doing it. A bill issued contrary to such pro- tion is certainly void. We think upon the whole that facts may be so pleaded."

Whilst at common law a party could not set up his own d or violation of law as a defense or protection to him- there is no question that when the statute declares an ument void for any reason, the defendant who is sued uch instrument may show the facts that make it void,

Opinion of the Court—Beatty, J.

although in so showing he also shows that he has been guilty of some crime, fraud, or violation of a penal statute. In such case it is the policy of the law to prevent some particular practice, such as usury, gaming, violation of the revenue law, etc. To effect that object more completely the law allows the defendant to plead and prove his own wrongful act, not so much to protect the defendant as to carry out the policy of the law in suppressing illegal acts. We have no doubt the defendant might plead and prove the want of a stamp or the proper stamps to the instruments sued on, if the facts as pleaded and proved made them invalid.

The real question in the case is, does the omission of the proper stamps from promissory notes, made since the 1st of August, 1864, and prior to March, 1855, render such notes *prima facie* invalid?

Section 151 of the act of June, 1864, provides that stamps of certain denominations shall be placed on various kinds of instruments, but fails to provide any penalty or forfeiture for using them without stamps.

Section 152 provides that instruments not properly stamped shall not be recorded; that the "record" of such instruments shall be "utterly void, and shall not be used in evidence."

Section 153 provides that no instrument shall be [*23] held "invalid *and of no effect" if it has stamps of the requisite amount, although not of the particular kind or description designated for such instruments. This section seems to have been based on the supposition that there was some part of the law preceding this section which declared instruments void which were not properly stamped. But we can find nothing of the kind. We are inclined to think that when the revenue bill was framed, section 151 did contain some provision of this sort. That would appear to have been the most convenient place for such provision. It would seem natural and orderly, after providing in section 151 for unstamped instruments being void, to provide in section 152 that they should not be recorded; that such recordation should be invalid, and of no effect.

An examination of the debates on this bill in the "Congressional Globe" shows that there was a great variety of opinions as to the best method of enforcing the stamp act duties. Some thought the law could only be properly enforced by making all instruments absolutely void that were not properly stamped when issued. Others, that such instruments should be *invalid until* properly stamped. Some were for allowing the parties to the instrument to cure the invalidity by attaching the proper stamps at any time subsequent to the making and delivery of them. Others, again, thought that if the stamps were not put on at the time of the execution of the instrument by the proper parties, they should only afterward be attached by a revenue officer: the parties wishing the stamps attached by the officer to pay for stamps, and a penalty of fifty dollars beyond the value of the stamps, unless he could satisfy the collector that the stamps were innocently left off at the time the instrument was executed, in which case the penalty might be remitted. But we believe that none thought the instrument ought to be available to the party holding it until it was properly stamped. Members having these conflicting views, a great many amendments were offered on this subject. Sometimes it was amendment to one section, and sometimes to another.

So far as we can see, the result of the various amendments has been to leave the law without any clause declaring instruments shall be invalid or void by reason of their not having stamps attached to them, except so far as they are declared void in section 158, which we shall now notice.

*Sec. 158 provides that if any person shall issue [*24] any note, bill, etc., without the proper stamps, "*with intent to evade the provisions of this act*, [he] shall for any such offense forfeit the sum of two hundred dollars, and such instrument, document, etc., * * * shall be deemed invalid, and of no effect."

Here, then, is a clear provision that instruments issued *with intent to evade the law*, shall be invalid; but there is a total absence of any provision making them invalid unless

Opinion of the Court—Beatty, J.

they were issued with such intent. If, then, no instrument is to be held void and inoperative except those off of which the stamps were left, *with intent to evade the law*, it appears to us the defendant in this case could not set up any defense founded on the want of the proper stamps, without pleading that such stamps were omitted with intent to evade the stamp act. For this reason, we think the defendant's answer is insufficient. The facts found by the court are likewise insufficient to justify a judgment for the defendant.

We are aware that in coming to this conclusion we are making a decision which renders the revenue law of 1864, so far as it relates to stamp duties, almost a dead letter. We are in effect holding that there is no adequate penalty for the violation of the law; but, if Congress has omitted to insert in the law any provision which would enforce obedience, it is not in the power of courts to supply it. We can only enforce the law as we find it, not as we suppose Congress may have intended to make it.

In March, 1865, Congress passed an act amending the 158th section, and providing the means of making instruments valid which were not properly stamped when issued. These amendments provide that any one having an interest in an instrument issued without the proper stamp, may have it stamped by paying for the necessary stamps (and in some cases interest on the amount of the stamps), and paying, in addition thereto, the penalty of fifty dollars. This may be done without inquiry as to whether the stamps were or were not left off the instrument when issued, with intent to evade the statute. If the party wishing the stamps attached makes application before the expiration of one year from the issuance of the instrument, and can prove to the satisfaction of the proper officer that they were not left off with intent to evade the law, then the proper stamps may be attached without the payment of the penalty.

[*25] *Taking the section as it is amended by the act of March, 1865, and it seems clear that Congress intended not only that all instruments requiring stamps should be held invalid when the stamps were omitted with intent to evade the law, but that in all cases where there

Opinion of Brosnan, J., on rehearing.

an omission, it should be held and presumed that it was the intent to evade the law, until that presumption is rebutted by having the proper stamps attached in the manner pointed out by the stamp act. When the stamps are properly attached by a revenue collector, the whole matter is settled. In other words, Congress has established the only tribunal before which the question can be brought to show whether the stamps were or were not innocently omitted. We should probably hold that, under the amended act, March, 1865, that if on the trial of the cause, the defendant did not have the proper stamp, it should be reversed. But this note was given long before the amendment passed, and that amendment cannot be held to have a retrospective action as to make a note invalid which was not so when executed and delivered. The judgment must be reversed, and a new trial awarded; and the case remanded.

MAYNARD v. JOHNSON, UPON REHEARING.

[2 NEVADA, 25.]

CONSTRUCTION OF STATUTES — DEBATES OF LEGISLATIVE BODY.—In cases of doubtful construction, the debates of a legislative body may be resorted to to determine the meaning of a law. But this only in cases where the language of the law is so ambiguous as not clearly to show the meaning intended to be conveyed.

CONSTRUCTION OF THE LEGISLATURE.—In interpreting doubtful statutes, the primary object is to ascertain the intent of the legislature. This intent is to be gathered, first, from the language of the statute, next from the mischief aimed at, and the benefits intended to be attained.

AMBIGUOUS.—If one clause of a statute is ambiguous, the whole statute must be examined to explain or remove that ambiguity.

STAMP ACT.—*Held*, that the terms "such instrument," in the latter section 158 of the stamp act, refers to all unstamped instruments and notes issued under the act of June 3d, 1864, not properly stamped, and were void, (overruling former opinion in this case, ante 16).

The Court, BROSNAN, J.:

[*26]

Rehearing was granted in this case, because the court was not entirely satisfied as to the correctness of its former opinion. We hoped that on a re-argument some more con-

Opinion of Brownan, J., on rehearing.

vincing reasons might be presented, calculated either to confirm the opinion heretofore expressed, or enable us to reach some other satisfactory conclusion.

The only question involved is one of statutory construction, arising out of the act of Congress entitled "An act to provide internal revenue to support the government, to pay interest on the public debt," etc., etc., approved June 30th, 1864.

The only point particularly urged on the rehearing by the respondent was, that the debates in the senate of the United States upon the passage of the act showed clearly that the senators gave to the law an interpretation different from that placed on it by this court. And it must be confessed that so far as the intention of the senate is to be gathered from the debates in that body, the respondent has successfully established his proposition. In case of doubt, and also where a statute will bear opposite meanings, either from inaptness of phraseology or an ungrammatical collocation of its several clauses, it is very usual to resort to the discussions of the legislators on the disputed point, with a view to the ascertainment of their intention. This is authorized and legitimate both in the interpretation of statutes and constitutions. Nevertheless, we think that courts are not accustomed to give controlling weight to the views of legislators expressed in debate upon the point under discussion. Most certainly not whenever the language of the statute is so clear and explicit as that a fair, rational, and pertinent meaning can be derived from the terms used. It is not denied that the intention of the law-makers is first to be sought, but that is to be spelled out from the words they employ as the medium to express and convey their meaning.

And although it be established doctrine at the present [*27] day that the right and duty to expound *doubtful and

ambiguous provisions of statutes devolve upon the judiciary, yet so important a subject is not committed to the arbitrary discretion of courts or judges. There are certain established rules of interpretation by which courts are governed. We will apply some of these to the discovery of the fact or truth which we aim to grasp in the case under consideration.

Opinion of Brosnan, J., on rehearing.

When a statute is of a doubtful meaning, the first thing to ascertain the intention of the legislature that framed the act; next, the course to be pursued to compass that result.

The intention of the legislature must be found, if possible, within the statute itself—that is, in the words which the legislature has employed. Outside of the statute, we are to consider the mischiefs it was intended to suppress; or, as the case may be, the object or benefits to be thereby attained.

Another well-settled rule is, that where a cause of doubt exists, although it attaches only to a particular word or clause, the whole statute is to be taken together, and so examined as to arrive at the intent, if possible.

With these rules in view, we proceed to inquire into the object of the statute under examination, and whether it does not contain within its terms and parts intrinsic and satisfactory evidence of the intention of the framers of the law.

The question of doubt arises on the construction of the 158th section of the act, which reads:

“That any person or persons who shall make, sign, or issue, or who shall cause to be made, signed, or issued, any instrument, document, or paper of any kind or description whatsoever, or shall accept or pay, or cause to be accepted or paid, any bill of exchange, draft, or order, or promissory note, for the payment of money, without the same being duly stamped, or having thereupon an adhesive stamp for denoting the duty chargeable thereon, with intent to evade the provisions of this act, shall, for every such offense, forfeit the sum of two hundred dollars.”

In this shape the section passed the house. In the senate, Mr. Fessenden proposed to add the following amendment to it:

“And such instrument, document or paper, bill, draft, order, or note shall be deemed invalid, and of no effect.”

In the discussion that arose upon this amendment it was assumed, *rather expressly conceded, by all [*28] the senators who spoke to the question, that the

Opinion of Brosnan, J., on rehearing.

effect of the amendment would be to make void all instruments requiring a stamp that were not stamped when executed. This fact or result, we say, was conceded by all the senators who expressed opinions on the subject, whether they spoke in favor of or against the amendment; and whether the stamp was omitted through neglect, mistake, or inadvertence.

To obviate this harsh result, senator Hendricks, of Indiana, offered a further amendment, so much of which as is necessary for the purposes of the argument is in the following words:

"Unless subsequently duly stamped, which may be done by the holder or other person interested therein, if the proper party refuses or is unable to do so."

The amendment of Mr. Hendricks was debated by himself and senators Fessenden and Reverdy Johnson, and they all again admitted that without the amendment of Hendricks, the effect of Mr. Fessenden's amendment would be to invalidate all instruments not properly stamped, irrespective of the inquiry or question whether the stamp was omitted innocently or negligently, or with intent to defraud the revenue.

The amendment of senator Hendricks was rejected, and upon motion of senator Collamer, the following proviso was annexed to the section:

"*Provided*, That the title of a purchaser of land by a deed duly stamped shall not be defeated or affected by the want of a proper stamp on any deed conveying said land by any person from, through or under whom his grantor claims or holds title."

In this shape, and with this understanding of its effect by senators, so far as we have any evidence, the section under consideration (section 158) passed the senate; and in the identical words incorporated therein by the senate we find it a law approved.

Thus far, then, the opinions of the lawmakers furnish a key to a correct interpretation, which is but another word to express their intention, respecting this particular enactment. Yet, as we have before said, these considerations,

Opinion of Brosnan, J., on rehearing.

ugh necessarily of weight in reaching an enlightened
gment, ought not, and will not, control the court,
se express terms of the act explicitly declare a *dif- [*29]
nt meaning or conclusion from that which these
atorial opinions indicate.

n our former opinion we interpreted the words "such
truments" as meaning instruments left unstamped with
nt to evade the provisions of the law. Though we make
pretensions of being formidable grammarians, we do
hesitate to say that, in view of the arrangement and con-
tion of the clauses of the section particularly under re-
w, and the terms employed, the words "such instrument"
y be held to relate to instruments left unstamped with a
ndulent intent. The former opinion hinged upon that
struction, and that, too, we repeat, without any strain
the language used. But upon further assiduous exam-
tion and reflection, we incline to the belief that the court
ed. That such interpretation, though supported by
ammatical rules, was too narrow and restrictive, and was
culated to defeat, in a great measure, the object of the
as being opposed to the express intention of the fram-
t. The law was designed to raise revenue to support the
vernment and pay the interest on the public debt. This,
ontrovertibly, was its main object and use. This object,
must be presumed, was ever present to the minds of the
mbers of Congress, and imparted color and direction to
ir deliberations and actions while they had the subject
ter under advisement. The exigencies of the times, as
a matter of historical and painful recollection to all good
izens, required that the contributions of all who claimed
a protection of the government should be as bounteous as
air means would justify and the necessities of the national
chequer would demand. The Congress of the United
ates, if actuated by a throb of patriotic emotion, which is
* questionable, could not be, was not, indifferent to this
dition of affairs. Impressed by these influences and con-
siderations, they passed the law, from the bowels of which
seek to eviscerate its meaning. *Evisceribus actus*. What
its true meaning? By applying the words "such instru-

Opinion of Brosnan, J., on rehearing.

ment" to those instruments from which are evasively or fraudulently omitted the required stamps, you leave all dependent upon the recovery of the penalty of two hundred dollars. But it must be a fact patent to all reflecting minds that no penalty regarding revenue stamp duties will protect the revenue. Nobody is interested to enforce the penalty, and in *one case in one hundred where an infraction of the law was committed the penalty would not be recovered. Suppose the law were that the instrument could not be used (sued upon, if you please) until stamped, let us consider how many thousands of instruments that require a revenue stamp would never come into a court of justice. To this extent the revenue is lost. The oldest lawyer, perhaps, has not had two suits upon bank checks, yet they are drawn by tens of thousands daily. So of notes.

Suppose the penalty alone was enforceable, who shall determine the question of fraudulent intent? How can it be proved? How or when shall it be determined? How many cases of the kind will ever be tried? But, again, if the instrument should pass unstamped through the hands of several parties, who of them or how many of them shall you sue to recover the penalty? Shall it be one, or two, or more penalties commensurate with the numbers of persons through whose hands the instrument has commercially passed? In fact, this amendment of senator Fessenden was inserted or withheld from abundance of caution, to secure a larger revenue; and there is no hardship in it, after all. Every man is bound to know the law in other matters as well as in this. Its object was to stimulate vigilance and attention, and thereby increase the revenue. Without it, the amount of revenue from that source would be nominal. Without millions would flow into the national treasury. In short, the construction placed upon the act by appellant's counsel would effectually defeat the object of the law.

But we proceed to a closer scrutiny of the language of the statute, and to a comparison of its several parts, to see if we cannot find in its very terms a meaning corresponding with the opinions of senators, and with the views forthrightly in the language above expressed.

Opinion of Brosnan, J., on rehearing.

Section 158 will warrant the following interpretation. It contains three propositions:

The first, that which it transported in its passage from the use into the senate, to wit: That the penalty only should be visited upon the omission to attach the stamp to the instrument, document, or paper.

Secondly, an independent proposition, to wit: The amendment of *Mr. Fessenden, superadded to the [*31] penalty, for the more certainly securing the greater revenue.

Thirdly, the proviso of senator Collamer.

Speaking for myself, I am inclined to the belief that, without the amendment of senator Fessenden, all such instruments as are described in section 158, if unstamped, would be void, if the intent to defeat the provisions of the law were proved, and there was no saving clause in the statute to obviate that result. And this from the fact that such an instrument stands in antagonism to the policy of public law. But I express no decided opinion upon this point, because I have not taken time to examine it, and I do not deem it necessary to the decision of the case before the court. The words "such instruments" I hold may relate, and in this instance do relate, to all instruments not stamped, mentioned in the section, no matter from what cause the stamp may have been omitted. This construction harmonizes not only with the understanding of the law-makers, but also with the proviso of senator Collamer, and with other sections of the act. The proviso of Mr. Collamer was intended to save an innocent *bona fide* grantee, who had himself personally complied with the law. To make "assurance doubly sure," the honorable senator intended that the innocent grantee should not be divested of his title because of the fraud or delinquency of any of his predecessors in the course of transferring the title. But if all unstamped instruments are not intended to be held void, the proviso would seem to be unnecessary. For I hold that a man is not chargeable with the consequences of a fraud unless he participates in it in any way in its concoction or perpetration.

But let us refer to other sections of the statute, because

Opinion of Brosnan, J., on rehearing.

we are bound, in expounding a statute, to give every part of it effect, if possible, and to construe one part of the legislative enactment by the light we derive from other parts.

In section 152 of the act under consideration, it is made unlawful to record any instrument, document, or paper required by law to be stamped, unless a stamp of the proper amount shall be affixed. And the *record* of such instrument not having the proper stamp or stamps, shall be utterly void, and shall not be used in evidence.

Again, section 153 of the same act ordains: "That no instrument, document, writing or paper of any de- [*32] scription, required by *law to be stamped, shall be deemed or held invalid and of no effect for the want of the particular kind or description of stamp designated for and denoting the duty charged on any such instrument, document, writing or paper: provided, a legal stamp or stamps denoting a duty of equal amount, shall have been duly affixed and used thereon." There is a proviso we need not quote.

After reading these sections of the act, independently of the views and opinions of the legislators heretofore stated, can it be reasonably claimed that this law does not make all instruments described in it void unless legally stamped, or unless, as provided for in section 153, they bear a stamp denoting a duty of equal amount to the stamp specifically prescribed for use on each particular instrument? If so, the sections contradict one the other. Take it that all the instruments mentioned in section 152, if unstamped, are invalid, and these sections are in perfect harmony and unison. Why shall the *record* of an instrument be held "utterly void," as declared in section 152, if the instrument be unstamped, and the instrument itself not be equally void? Why shall an unstamped instrument "be held invalid and of no effect," as denounced in section 153, if the same instrument be held valid under section 152 of the same act, as contended for by the appellant's counsel? Such a construction would make the statute incongruous and contradictory.

Opinion of Brosnan, J., on rehearing.

gain, the act was not to take effect until the first day of August following. This was certainly intended to apprise the public, to familiarize the public with the law, so that they might guard against its operation and effect. Furthermore, the act saved all unstamped instruments previously executed and delivered, as will be seen by reference to section 163. That section, among other things, contains the following proviso: "That no instrument, document, or paper, made, signed, or issued prior to the passage of this act, without being duly stamped, or having thereon an adhesive stamp or stamps to denote the duty imposed thereon, shall for that reason, if the stamp or stamps required shall be subsequently affixed, be deemed invalid and of no effect."

We think the inference legitimately deducible from this provision is, that Congress intended that all unstamped instruments executed after the act of 1864, should take effect, no matter with what intent, or from what cause, without a legal and requisite stamp or stamps may *have [*33] been omitted, should be invalid and of no effect. Therefore, we conclude that the act upon its face manifestly indicates the intention of its framers.

There seems to be no question that the Congress of 1865 understood the act of 1864 as we now read it. On the third of March, 1865, an act was passed amendatory of the act of June 30, 1864. The act of 1865 amended section 158 of the law of 1864 so as to reduce the penalty to fifty dollars, and annexed to section 158 provisions by which unstamped instruments may be made valid. This is forcible evidence of the fact that the Congress of 1865 understood the act of 1864, as senator Fessenden and his associate senators understood it, namely: that it annulled all instruments not duly stamped made during the time the act was in force. (The act of Congress passed March 3, 1865, sec. 158.) And we are authorized to resort to this subsequent legislation as one of the means outside of the statute to arrive at the true intent and meaning. If it can be gathered from a subsequent statute, *in pari materia*, what meaning the legislature attached to the words of a former statute, this will amount to a legislative declaration of its meaning, and is

Opinion of Brosnan, J., on rehearing.

entitled to great weight in the construction of the first statute. (*Morris v. Mellin*, 6 Barn & C. 446 *et seq.*)

Finally, though there may be a doubt as to the meaning and application of some word or clause in a statute, yet if the intention of its framers be apparent, that intention must control the construction of the act. Under this rule it results that statutes are very often construed against their letter; that words are sometimes expunged, other words supplied, to carry out the object of the law. The books teem with instances of this character. We hold the following propositions to be well settled and established law:

Where the words of a statute are obscure or doubtful, the intention of the legislature is to be resorted to in order to discover their meaning. A thing within the intention is as much within the statute as if it were within the letter; and a thing within the letter is not within the statute if contrary to the intention of it.

So, again, such construction ought to be given as will not suffer the statute to be eluded. (*People ex rel. etc. v. U. Ins. Co.*, 15 J. R. 358, 380; 3 Cow. R. 89; 21 Wend. 211; 13

Mass. 518; 8 Pick. 516; *Henry v. Tilson*, 17 Vt. 479.

[*34] *After an earnest effort to reach the truth, and, therefore, a just judgment in this case, in view of the terms of the statute under examination, as well as the manifest object of it, and the legal rules established for the interpretation of laws, we have become satisfied that the court reached an erroneous conclusion in its former opinion. Having thus determined, though exceedingly reluctant to declare the instruments set out in the complaint void under the law, we cannot hesitate to reverse our former ruling in obedience to our clear conviction.

Our first decision is accordingly set aside, and the judgment of the district court will stand affirmed.

Points decided.

N. KILLIP, ADMINISTRATOR OF JAMES M. KILLIP, APPELLANT, v. THE EMPIRE MILL CO., DEFENDENT.

[2 NEVADA, 34.]

—WHEN NOTICE OF INTENTION MUST BE FILED.—When notice of a motion to move for new trial is served within two days after judgment, followed up by statement, etc., as the statute prescribes, the court retains jurisdiction of the case so far as to be able to dispose properly of the motion for new trial, although the court may have adjourned for the interim between the day judgment was rendered and the filing of notice of motion, making any order continuing the jurisdiction over the case. If the term expires, and no notice of intention to move for new trial is filed within the statutory time, then the court loses jurisdiction of the case.

—NOTICE OF INTENTION, HOW GIVEN.—A mere verbal notice, given out in conversation with counsel of the successful party, that a new trial should be moved for, is not sufficient.

—RIGHTS.—Rights may be waived by express declaration of intention to waive a right, or some act equally indicative of such intention, or some act or declaration which has induced another party to think he has waived his right, and induced the other party to act on that supposition.

—DUTY OF COUNSEL.—It is not the duty of counsel to inform their opponents of the steps they are about to omit some steps in the proper management of the case.

—WHEN NOTICE OF INTENTION CANNOT BE FILED NUNC PRO TUNC.—A court having lost jurisdiction of the case by the lapse of time, and the respondent to file notice of intention to move for new trial two days after judgment, could not restore its jurisdiction by allowing the notice to be filed *nunc pro tunc* as of a former day.

—APPEAL.—WHEN REVENUE STAMP MAY BE AFFIXED.—A revenue stamp may be affixed to the notice of appeal even after motion to dismiss. When affixed, it renders notice operative from the time of filing.

—DO NOT BE TAKEN FROM A VOID ORDER.—It is not necessary to set aside a void order which can have no operation or effect.

—NOTICE OF INTENTION WHEN NOT WAIVED.—*Extending [*35] the time for making statement, under the circumstances of this case, cannot be construed as a waiver of notice of intention to move for new trial.

—PRACTICE ACT CONSTRUED.—The object of this section is to protect a party from the effects of some judgment or order made by the court in its regular proceedings; not to give a party some affirmative relief which he has lost by his own conduct, but in regard to which the court has made no order whatever.

—WHEN COURT OF EQUITY MAY GIVE RELIEF.—A court of chancery may give relief from a judgment at law, after the law court has lost all jurisdiction. But it must be upon a bill filed in a proper case. This relief cannot be granted on motion.

ON REHEARING.

APPEAL from the District Court of the First Judicial
trict, Hon. RICHARD S. MESICK, presiding.

The facts are stated in the opinion.

Tod Robinson, for Appellant.

L. Aldrich and C. J. Hillyer, for Respondent.

[*36] *By the Court, BEATTY, J.:

The plaintiff in this case brought an action, in the
of an action of ejectment for an undivided interest in
tain piece of mining ground. The plaintiff claim
derive his title from a deed executed by one Clark to
Calip.

The defendants claimed to derive title from the
Clark, and averred that when the deed was m
[*37] Clark, the name of J. M. *Killip or *Calip* v
serted therein by mistake; that it should hav
made to one Rice, from whom defendants derive
Defendants made their answer in the form of a cro
plaint, and demanded a reformation of the deed from
so that the name of Rice should be inserted in lieu o
Calip. This cross-complaint of defendant seems t
been first disposed of by the court refusing to refo
deed. After this determination of the case by the
acting in the capacity of chancellor, the case in e
was submitted to the jury, and they rendered a ver
favor of plaintiff, and a judgment was therein e
Subsequently, the court below made an order gra
new trial, and from that order an appeal was taken
court.

The appellant contends that this case cannot be he
its merits, for the reason that no motion for new tr
made during the term at which the judgment was rer
nor any order made during the term extending the t
making such motion or continuing the jurisdiction
court over the case.

Opinion of Beatty, J., on rehearing.

for further reason, that notice of intention to move new trial was given within the time prescribed by . The facts on which these propositions are based follows:

verdict of the jury was rendered, and the judgment l, on the first day of March, 1865. On that day, the was adjourned for the term. On the second day of 1865, one of the counsel for respondent, A. W. n, Esq., prepared a notice of intention to move for rial to be served on the opposite counsel, but by oversight this notice never was served. After the and judgment (the affidavit of Baldwin says the first sh, that of Foster fixes it the third of March), Baldwin ster, one of counsel for appellants, met, and some ation took place about the preparation of a statement r trial.

version of this interview differs slightly as given by n and Foster. But Baldwin, either directly or by ation, informed Foster of his intention to move for a al, and asked an extension of time to file his *statement* ion for a new trial. Foster did not object to the ex- of time, but referred Baldwin to Judge Bryan, an te counsel, for the signing of any requisite stipula- s he did not desire to sign any. Bryan was pplied to, and he declined to act, but referred [*38] nsel of defendant to Judge Robinson, a third l for plaintiff. A written stipulation in these words it to Judge Robinson's office: "By stipulation in the ause, the defendant is allowed an extension of fifteen herein to file a statement on motion for a new trial." it noon of the third day of March, Robinson brought pulation to the office of defendant's counsel, and de- he could, or would not sign that stipulation, but did o draw up one to suit himself, says Baldwin, and

nson says he assured Baldwin he had no objection aking the fifteen days, and would take no advantage failure to file statement, in less than fifteen days. had not been able, as yet, to draw a stipulation
REV. DEC.—36

Opinion of Beatty, J., on rehearing.

satisfactory to himself, and was afraid he could not. If he was afraid some inference might be drawn, from any of the stipulation, prejudicial to his client's rights. The statements differ slightly; but taking them both together and it is evident Robinson was willing to give the time required, but unwilling to waive anything by so doing. Between the third and sixth, another application was made to Robinson to sign the stipulation, or some stipulation to extend the time, and, on his declining to do so, application was made to the district judge to extend the time for the statement. This order he made on the sixth of May.

On the 11th, for the first time, Baldwin discovered notice of *intention* to move for a new trial had been looked by his clerk, and not served.

Application was then made, on proper notice to the court, for leave to serve this notice *nunc pro tunc*. In this order was made. Had the court, under this state of facts, any jurisdiction over the case, and the right to a new trial?

The first point of appellant is, that the court lost jurisdiction over the case by adjournment, without making order for retaining the case within its jurisdiction, for the purpose of hearing a motion for a new trial, or any other purpose. The general principle contended by appellant is undoubtedly correct. But, we think the statute operates to continue the jurisdiction of courts in cases where the judgment is followed by notice of intention to move for new trial, statement on motion, &c., made within the respective times prescribed by statute. Certainly, under ordinary circumstances, if no notice of motion for new trial is made within two days after rendition of judgment, and the court has adjourned, all jurisdiction of the court is lost, and the case would be gone; the statute makes one exception to this rule, and allows six months after the rendition of judgment, where judgment was not served on defendant, to allow the court to correct errors, and to set aside a judgment where there is something wrong in the manner of the court whereby to make corrections or supply the defect.

Opinion of Beatty, J., on rehearing.

In this case the judgment was on the first day of March the adjournment on the same day. If, before the end of the third of March, there was no notice of intention to move for a new trial, no waiver of that notice, and no act which was equivalent to notice, then the court lost jurisdiction of the case.

First. Was there a notice such as the statute requires? The practice act, section 195, requires a notice of intention to move for a new trial to be given within two days after the adjournment, and within five days thereafter the necessary statements or affidavits to be filed, etc. This section does not, however, require the notice of intention to be given in writing; but the act requires each of these things to be done within a specified time. If the notice is not given in writing, as a matter of practice, it would be extremely difficult to determine, with certainty, the date at which such notice was given, and the result would be a great temptation to perjury and misrepresentation of facts, and uncertain and unsatisfactory records. This court would frequently be compelled to weigh testimony and determine doubtful facts, when, under a proper practice, no such doubt could arise.

If, then, this were a new point, never decided by any other tribunal, we should hesitate long before we would hold that a mere verbal notice would be sufficient. More especially would we be unwilling to hold that a mere casual observation, not intended to operate as a formal notice, but merely as an introduction to another subject, should be held as a sufficient notice. In this case it is not pretended by Baldwin that his observations to Foster were intended to operate as a notice. When he made those remarks to Foster about his intention to move for a new trial, he thought his clerk had already served, or would [*40] serve, the written notice of intention.

Whatever he said on this subject was merely as introductory to his request for extension of time to prepare a statement on motion for new trial. It was not intended as a formal notice. But we are not without decisions on this subject. We think it has been repeatedly held that, when

Opinion of Beatty, J., on rehearing.

a statute requires a notice to be given in the course of any judicial proceedings, and the mode of giving it is not pointed out, it must be given in such way as to preserve some tangible evidence of a compliance with the law. Sometimes it has been held or intimated that such notice could not be given in writing. In other cases it has been held, that a notice given in open court, when entered on the minutes kept by the clerk, might be sufficient if such minutes showed all the necessary facts, such as the form and date of notice, the presence of the party in court to whom the notice was given, etc. But this, we think, is as far as any court has gone in dispensing with a written notice. (See *Borland v. Thornton*, 12 Cal. 440; *Bear River Co. v. Bales*, 24 Cal. 354.)

Secondly. Was there any waiver by appellants to excuse the non-delivery or service of notice of intention to move for a new trial? Usually a person waives a right in one of two ways: as by express declaration of intention to waive a right, or some act equally indicative of such intention; or, on the other hand, by some act or declaration which has induced another party to think he has waived his right, and induce the other party to act on that supposed waiver. In this latter case, the waiver is a species of estoppel? Does this case come within either of these classes? When Robinson refused to sign the stipulation prepared for him at the office of Baldwin (whether we take the version given by one or the other of those gentlemen) if it shows anything, it shows this: that Robinson was willing to give the extension of time for the preparing of a statement, if he could do so without waiving any right of his client in other respects; but was determined to be very guarded in signing any stipulation to that effect, not to waive other rights. Certainly there could have been no other objection to sign the stipulation proffered, except the fear of its being treated as a waiver of something else.

Did the conduct of Robinson induce the other side [*41] to do any material thing, or refrain from doing anything necessary to preserve their rights? He certainly did not induce respondents to do any affirmative act to

Opinion of Beatty, J., on rehearing.

ange their condition. He did not do anything to prevent
sir serving their notice of intention. Baldwin acted on
a belief it was served. Robinson's conduct was not calcu-
ed to induce Baldwin to omit the making of service; but
a hesitation, his expressed fear of waiving some right,
ould have put Baldwin on his guard, and induced greater
gilance. He evidently saw Robinson conceived his client
ul some legal advantage, which he would not waive. If
aldwin had never seen Robinson still the notice of inten-
on to move would never have been served.

Their interview did not cause the paper to be covered up
a the table of Baldwin's clerk.

From the earnestness with which the appellants argued
e proposition that the court having adjourned without
aking any order keeping the case open for motion for new
ial, that it lost jurisdiction thereof at the end of the term,
would seem most probable that Robinson's objection
signing the stipulation about the time for making a state-
ent had reference to this point. Supposing the court had
st jurisdiction of the case, he did not want to invest the
urt with any new powers by signing the papers presented
him.

But admitting that he was aware Baldwin had not served
ny notice of intention to move for a new trial, and possibly
ight not do so if he was not reminded of his duty in this
spect, was it Robinson's business to remind him of his
ailure? Should he, when at Baldwin's office at noon, on
he third day of March, have said, "you have not yet served
n with any intention to move for a new trial?" Had he
lone so, would it not have been a gross violation of his duty
o his own client? We cannot think it the duty of counsel
o inform their opponents of any omission they are about
o make in the management of their side of the case.

We are clear, then, that this case is unaffected by the
onduct or declarations of Robinson and Foster, at their
veral interviews with Baldwin.

Leaving these acts and declarations out of view, and the
imple question is, whether the court, having lost jurisdic-
ion of the case at the end of the third of March, that juris-

Opinion of Beatty, J., on rehearing.

diction could be restored by an order allowing respondents to serve a notice in the month of *May, which should, under the order of court, take effect as if it had been served on the third of March preceding.

We think that the very statement of the proposition shows how it should have been determined. If the court had lost jurisdiction of the case, the order itself was made by a tribunal having no jurisdiction, and was a nullity. If the court could, by such an order as this, restore its own jurisdiction, it might, when a party brings a suit on a note barred by a statute of limitation, make an order that when the clerk filed the complaint he should file it *nunc pro tunc*, as of some former date, so as to be within the statutory time for bringing the action. So, too, if a party failed to file his notice of appeal within one year after judgment, the court might on the same principle direct the clerk to date the filing as of some former day, so as to bring it within one year. The court cannot by an order *nunc pro tunc* repeal or suspend the operation of a statute.

In this case the whole proceeding on motion for new trial was an absolute nullity, for want of the service of notice of intention to move for a new trial within the two days limited by law. If the oversight in serving the notice had occurred and been discovered during term time, it is not necessary here to determine whether the court could have relieved the party from the effect of this inadvertence or mistake.

Respondents move to dismiss this appeal because the notice of appeal had no state revenue stamp upon it. The law on this subject is not very clear, yet we think it apparent that it was not the intention of the legislature to make any instrument void for want of a proper stamp, but simply to render them invalid and ineffectual until the stamp was affixed. When the stamp is affixed, then the instrument is to take effect from its date. We have held, several times on preliminary motions to dismiss appeals for want of stamps on notice of appeal, that the stamp might be affixed after motion made. We allowed that course to be pursued in this case, and think it the proper practice.

Opinion of Beatty, J., on rehearing.

There was no necessity for the appellant to appeal from the order allowing the notice to be filed *nunc pro tunc*, for the reason that the order was a nullity, and could not affect him. If it had been an order which the court had a right to make, and it had merely been a question whether that right was exercised with proper discretion, *the [*43] only way to review that discretion would have been by appeal from the order. But the order itself being a nullity, and not affecting the rights of appellant, there was no necessity for an appeal. When an appeal is taken from an order granting a new trial, this court must ascertain from the record whether the court below had the power to make such order.

Respondents contend that appellant verbally extended the time for filing statement, and thereby waived the service of notice of appeal, and refer to *McLeran v. Short*, 5 Cal. 60, and *Williams et al. v. Gregory et al.* 9 Cal. 76. If those cases are authority, of which we have some doubt, they are very different from this. The conduct of respondent in each of these cases was such as to show he acquiesced in the omission of the notice. In the first case he appeared in the county court and contested a motion for a continuance, without any objection to the sufficiency of the notice of appeal. In the latter case the respondent filed a counter statement, etc., after the statement was filed.

Here appellant filed no counter statement, did not appear to contest the motion for new trial, nor do any act to waive his rights, except to express his willingness that respondents might have fifteen instead of five days within which to file statement, and accompanying this verbal agreement was a clear intimation that it must not be construed as waiving anything. When this agreement for extension was made, the time for serving notice had not expired. Surely if that agreement waived any past omission, it would hardly be construed as waiving a thing which might be done in the future, and ought to have been done thereafter, even if Robinson had signed the stipulation offered to him.

Respondents contend that the court was authorized to grant relief from the effects of their omission to serve notice

Opinion of Beatty, J., on response to petition.

by the provisions of the sixty-eighth section of the practice act, and they quote and italicise the following language in that section: "The court may in furtherance of justice

* * * *relieve a party, or his legal representatives, from a judgment, order, or other proceedings taken against him through his mistake, inadvertence or excusable neglect.*" The order here did not relieve respondents from any judgments, etc., taken against them by mistake, inadvertence or excusable neglect. The judgment was upon a full trial, and not [*44] as the result of any omission of respondents. They do not ask to be relieved directly from any judgment or order against them. They ask to be placed by the order *nunc pro tunc* in a situation to take some step against the appellant.

The evident object of this statute is to relieve a party from the effects of some judgment or order made by the court in its regular proceedings; not to give a party some affirmative right which he has lost by his own conduct, but in regard to which the court has made no order whatever.

We have made no examination of this case so far as the merits are involved. For such purpose the case is not before us.

This is simply an appeal from an order granting a new trial, and the district court had no jurisdiction of this case for such purpose.

The order for a new trial is set aside, and the original judgment restored.

BROSNAN, J., did not participate in this decision.

JASPER N. KILLIP, APPELLANT, v. EMPIRE MILL
AND MINING CO., RESPONDENT.

[2 NEVADA, 44.]

RESPONSE TO PETITION FOR REHEARING.

By the Court, BEATTY, J.:

In this case a petition for rehearing has been filed, which is based on two grounds:

First. That this court erred in holding that the district

Opinion of Beatty, J., on response to petition.

urt had lost *jurisdiction* of the case before the order granting a new trial was made.

Second. That a verbal notice of intention to move for a new trial is insufficient.

In support of the first point, counsel lay down these propositions:

"1st. That a court will not, after the adjournment of the term, *correct or amend its judgments or records, except in clerical matters or matters of form. [*45]

"2d. That a court of general jurisdiction, notwithstanding the foregoing rule, will, on proper proceedings instituted before it, allow its judgments at a former term to be attacked; will grant injunctions to restrain their executions; will set them aside for fraud; and maintain a jurisdiction over them to inquire into the circumstances under which they were rendered."

These propositions are, in some sense, correct, when applied to courts having both common law and chancery jurisdiction. In other words, the equity side of the court will, upon a proper showing in a bill filed for that purpose, set aside a judgment previously rendered by a common law court. So, too, on a proper showing in a bill of review, it will set aside or amend a decree rendered at a former term by the same court. But these proceedings are based on the express theory that the court has lost jurisdiction of the former case. A court of chancery relieves from the effect of a judgment at law only because the law court has lost jurisdiction, and cannot afford the relief sought. This was not a proceeding in a distinct case in equity, but a proceeding in the law court, which had lost jurisdiction of the case—rather, lost jurisdiction over the judgment. Even after judgment and term expired, the court, for certain purposes, retains jurisdiction. It has jurisdiction to control the execution and subsequent proceedings, but no jurisdiction to alter or control the judgment, except in certain specified cases, when the statutes give such jurisdiction.

We are satisfied, as before held, that the court, before it made the order for filing a notice *nunc pro tunc*, had lost all jurisdiction over the case for this purpose.

Opinion of Beatty, J., on response to petition.

In relation to the second point, counsel argue that the two authorities cited in support of the proposition that a verbal notice of intention to move for a new trial is insufficient, ought not to be relied on authoritative on that point.

In relation to case cited from 13 Cal. 440, it is contended that it should not be held as good authority, because counsel for appellant, in that case, makes an erroneous quotation from the practice act, which may have misled the court.

We do not think that counsel, in the case of *Borland* v. *Thornton*, assumed to quote section five hundred and seventeen, but merely stated in their points what they assumed to be the operation and effect of the statute. We are satisfied, from the language used by Judge Field, that he was not misled in the matter. He says in his opinion: "Where the statute speaks of notice it means written notice, or notice in open court, of which a minute is made by the clerk." When the judge wrote this opinion he must have been fully aware the statute spoke of "notice" generally, for if the statute had read "written notice," there certainly would have been no necessity for saying "*written* notice means *written* notice." It is clear that it was the opinion of the judge who wrote that opinion, that where a statute requires a "notice" to be given in judicial proceedings, it shall be held to mean either a written notice, or one given in open court, and entered on the minutes of the court.

Counsel contend that the case in 24 Cal. is not a reliable authority, for the reason that the same judge who says: "The law provides that notice of a motion for a new trial shall be given, and the notice intended is written notice," afterward says: "At best, it is a doubtful question."

True, the judge who rendered that opinion says it is "a doubtful question," whether a notice given in open court, and entered on the minutes of the court by the clerk, might not be as effectual as a written notice. But the judge never expressed a doubt about the effect of a mere *verbal* notice. Upon that subject he expressed *no* doubt. He was satisfied such notice would be insufficient. This court agrees with

Points decided.

The learned judge who rendered that opinion, fully. The verbal notice is insufficient. The other is a doubtful question, and we have not decided it.

The rehearing is denied.

THOMAS McCLUSKY, RESPONDENT, v. ADAM GERHAUSER, APPELLANT.

[2 NEVADA, 47.]

PLEADINGS—POSSESSION OF A PROMISSORY NOTE NEED NOT BE ALLEGED.—The plaintiff in an action against the maker of a promissory note, may show that the note sued on is in the possession of defendant, although that fact is not alleged in the complaint. If the plaintiff is the owner of a promissory note, he has a right of action notwithstanding the defendant may be in possession thereof. The plaintiff's want of possession changes the character of the proof to be introduced, but not the character of the pleadings.

PLEADINGS—LOSS OF AN INSTRUMENT.—A party need not plead the loss of an instrument to be allowed to introduce secondary evidence of its contents. It is only necessary to prove such loss on trial. The rule of pleading is different where a negotiable note properly indorsed is lost.

NOTICE TO PRODUCE PROMISSORY NOTE.—Upon notice to defendant who is in possession of note sued on, to produce the same, and failure on his part, plaintiff may prove contents.

APPLICATION FOR NEW TRIAL ON GROUNDS OF SURPRISE.—When a party applies for a new trial on the ground of surprise, he must show that he has evidence, which, if introduced on the second trial, will probably change the result; or at least has evidence tending to rebut the point made by the other side which he complains of as a matter of surprise.

FINDINGS—WHEN EXCEPTIONS TO MUST BE TAKEN.—A defective finding of facts is not a ground for reversing a judgment when that defect is not noticed or complained of in the court below.

APPEAL from an order refusing a new trial in the District Court of the First Judicial District, Storey County, Hon. CALEB BURBANK presiding.

The facts sufficiently appear in the opinion.

Pitzer & Keyser, for Appellant.

C. J. Lansing and Campbell & Seely, for Respondent.

Opinion of the Court—Lewis, C. J.

[*49] *By the Court, LEWIS C. J.:

The first question naturally presented upon the record in this cause arises upon the admission of evidence at the trial to prove that the note sued on was in the possession of the defendant at the time of the trial, the appellant claiming that as there was no allegation of that fact in the complaint, no evidence could properly be introduced to establish it. In this he is clearly in error.

Such an allegation would have been entirely unnecessary. The gist of the action is the ownership of the note, and not its possession. Though it be in the defendant's possession, if the plaintiff be the owner, his right of action is as perfect as if it were in his own possession; and unless the defendant deny its execution it would be unnecessary to introduce it in evidence at the trial. If the right of action would be complete and perfect in the plaintiff, notwithstanding the note be in the possession of the defendant, we see no necessity for an allegation of that fact in the complaint. In pleading, it is only necessary to allege those facts which constitute the plaintiff's cause of action, or the defendant's ground of defense. In an action upon a promissory note, the fact that it is in the possession of the defendant is in no wise material to the plaintiff's right of recovery.

It merely changes the character of the evidence which he will have to produce to establish the execution of the instrument.

If it be in his own possession, the note itself is the best evidence, and he would be required to produce it; but if it be in the defendant's possession, and he fails to produce it, the plaintiff is permitted to prove its execution and contents by secondary evidence.

Upon the rule contended for by the appellant, [*50] secondary evidence *of the contents of a written instrument could never be introduced, though the destruction of the original be proven, unless its destruction or loss be specially pleaded. We know of no rule which requires a party to plead a fact which, when established, has no effect whatever, except to admit secondary evidence to

Opinion of the Court—Lewis, C. J.

his right of recovery or ground of defense. There is a material distinction between the case where the party has lost a negotiable promissory note before maturity, as properly indorsed, and the case where it is in the possession of the maker, or the party against whom the action is brought. When a note or bill payable to bearer, or indorsed, was lost before maturity, it was formerly the rule that the owner could not maintain his action upon it in a court of law, but was compelled to make application to the courts of equity for relief, for as a *bona fide* holder of a note taken in the ordinary course of trade would have no right of recovery on it, it would be impossible for him who had lost it to establish his right of recovery.

But in the present case, where the plaintiff, who had lost a note, might recover; but to bring him to the aid of equity, it was necessary to set aside the loss of the note in his bill, because a court of law will only lend its aid in those cases where there is an adequate remedy at law. If the note were in the possession of the plaintiff, his remedy would be complete at law. Hence the allegation of its loss, because necessary to bring the plaintiff within the pale of equity jurisdiction. But where the note was in the possession of the defendant, we apprehend it has never been held that the plaintiff was compelled to resort to equity for relief, or that the fact that the note was not in his own possession would prevent him from recovering. We think it has always been held that this remedy is available at law. (Chit. Bills, 301.)

In the present practice under the code, if the plaintiff wishes to prove the note, he must produce it at the trial, the proper practice would be to require the defendant to produce it; and if he fails or refuses to do so, secondary evidence of its execution may be introduced. (Sec. 394, Civil Pr. Act.) There was no objection, therefore, in admitting proof of the fact that the note was in the possession of the defendant.

The second point made by appellant is, that the [*51] evidence thus introduced operated as a surprise upon

the fact, the note was not in his possession, he may not complain of having been taken by surprise by

Opinion of the Court—Lewis, C. J.

the evidence of the plaintiff, for the general presumption is that the note sued on is in possession of him who brings the action upon it; and if the defendant had not convinced us by his own showing that a new trial would probably produce no different result, we would have no hesitation in saying that it should have been granted. But the evidence which the defendant presents to us, and which he claims might have been produced at the first trial, had he supposed the plaintiff intended to prove that the note was in his (defendant's) possession, should not have the slightest weight in overcoming the case made out by the plaintiff, and we think could not possibly produce a different result in another trial. The case made out by the plaintiff was that, on or about the 20th day of April, 1864, in the city of Virginia, the defendant executed and delivered the note in question to him. None of his witnesses swear positively as to the precise day of its execution and delivery. The proof which the defendant failed to produce at the trial, and which he offers to present if a new trial be granted, simply goes to prove that on the 20th day of April, A.D. 1864, he was not in the city of Virginia. This is the only material fact sworn to by any of the witnesses whose affidavits were presented on the motion in the court below.

That fact if conclusively established, would not even tend to defeat the plaintiff's case, or to contradict the testimony of any of his witnesses.

It is just as probable from the evidence of the plaintiff, that the note was executed and delivered on the nineteenth or twenty-first, as on the twentieth.

The proof, therefore, that the defendant was not at Virginia on the twentieth could have little or no weight in overcoming the case made out by the plaintiff. Had the precise day and place been positively fixed by him, evidence tending to show the defendant was not at that place upon the day fixed, would doubtless have some weight in overcoming the plaintiff's proof. But in this case no precise day is fixed. To set aside a judgment and order a new
[*52] *trial, when by his own showing the surprise of which the defendant complains resulted only in depriving

Opinion of the Court—Lewis, C. J.

the opportunity of introducing evidence which would
defense to the plaintiff's right of recovery, or tend to
his case, would be clearly erroneous.

ly when a judgment is set aside, or a new trial is
it is for the purpose of correcting some error or
city committed at the former trial, by which the
f the party making the application were prejudiced,
believe him from an injury resulting from such sur-
could not have been guarded against by ordinary
e. If it appears that a party has suffered no injury
irregularity or surprise complained of, the courts
iformly refused to award a new trial. So it is also
when it is evident that a second trial will not or
not change the result. When, therefore, an appli-
made to set aside a judgment on the ground of
, and it appears from the applicant's own showing
ie had not been taken by surprise the result would
e been different; or at least, unless it appears that
lt of a second trial will probably be different, a new
ould not be granted. (3 Gra. & Wat., New Trials,
.)

Also urged by the appellant that the judgment should
sed because the court below failed to find whether
certain judgment obtained by the plaintiff against
ndant in the month of January, A.D. 1865, consti-
bar to the present action. The record does not
at this fact was called to the attention of the court
or that any exception was taken to that failure on
of the court.

an exception is not taken in such case, the judg-
ll not be revised. Sec. 2, p. 394, Stat. 1864-5, ex-
provides that "in cases tried by the court without
o judgment shall be reversed for the want of a find-
he facts, unless exceptions be made in the court
the finding or to the want of finding." Upon this
erefore we cannot reverse the judgment.

the newly-discovered evidence, we have already
at it is not of that character which would be likely
e the result of the first trial.

Opinion of the Court—Lewis, C. J.

[*53] *And unless it be probable that the newly-discovered evidence will produce a different result, a new trial should not be granted. (3 Gra. & Wat. New Trials, 1043.)

The judgment of the court below must, therefore, be affirmed, and it is so ordered.

T. M. NOSLER, APPELLANT, v. M. P. HAYNES ET AL.,
RESPONDENTS.

[2 NEVADA, 53.]

MORTGAGE—ASSIGNMENT OF, WHEN VALID SECURITY.—G. advanced money to a mortgagor to take up a mortgage. The money was paid to the mortgagee, and some days thereafter he assigned the mortgage to the party who advanced the money: *Held*, that if this assignment was made in pursuance of a contract between G. and the mortgagor, it was a valid security for the money advanced. But if the assignment was made after the money had been paid to the mortgagee, and not in pursuance of a previous contract, the mortgage was extinguished, and afforded no security to G.

¹ ERROR MUST AFFIRMATIVELY APPEAR.—This court cannot reverse a judgment unless it affirmatively appear that error has been committed.

APPEAL from an order of the District Court of the Second Judicial District, Hon. S. H. WRIGHT presiding.

The facts are stated in the opinion.

Will Campbell, for Appellant.

Robert M. Clarke, for Respondents.

By the Court, LEWIS, C. J.:

This action was brought to foreclose a certain mortgage executed by the defendants to one F. A. Tritle, on the 23d day of August, A.D. 1862, and afterwards assigned and transferred to the plaintiff, who now claims to be the owner thereof. The complaint contains the usual allegations in actions of the kind—the execution and delivery of the note and mortgage; the assignment to the plaintiff, and the

re on the part of the defendants to discharge the
The *defendants admit the execution and de- [*54]
y of the note and mortgage, but as a defense to
plaintiff's right of foreclosure, they rely on the follow-
acts, which are presented to us in the findings of the
below.

the 2d day of July, A.D. 1863, which was long after
note and mortgage, here sued on, became due, one
r Gentry loaned the defendant, Moses P. Haynes,
um of five hundred and fifty dollars, for the purpose
ying and discharging the same; that two days there-
the note and mortgage were assigned and transferred
entry by the attorney in fact of the mortgage; and were
equently assigned by Gentry to the plaintiff Nosler,
now claims that he is entitled to recover the sum of
een hundred and twenty-five dollars, the amount due
on.

the following stipulation entered into by the counsel of
pective parties to this action, on the 2d day of May,
1865, appears in the record:

It is hereby stipulated and agreed, by and between the
es in the above cause, that the judgment herein to be
ered shall be rendered and entered for the sum of five
hred and fifty dollars in gold coin of the United States,
ing interest on said sum at the rate of ten per cent. per
um, and costs of suit."

judgment was rendered, in accordance with this stipula-
in favor of the plaintiff, for the sum of five hundred
fifty dollars, but the court below refused to order a sale
e mortgaged premises to satisfy such judgment. From
 refusal of the court to make such order, the plaintiff ap-
s. The record does not contain the evidence adduced
e trial, and from the meagre synopsis of the facts pre-
d to us by the transcript, we find it impossible to de-
ine whether it was the understanding between Haynes
Gentry that the mortgage should be assigned by Tritle
entry as security for the five hundred and fifty dollars
d, or whether Gentry made the loan to Haynes with no
understanding or agreement, and the note and mort-

Opinion of the Court—Lewis, C. J.

gage were subsequently assigned by the attorney of Tritle without authority from Haynes to do so. If Gentry loaned the money to Haynes for the purpose of enabling him to pay off and discharge the note and mortgage, and with no understanding that they should be transferred to him as security

for his loan, the payment of the money to Tritle [*55] would extinguish the *note and mortgage if they were in his possession, as it is admitted they were, and a subsequent assignment of them to Gentry, after maturity, and without the consent of Haynes, would give the assignee no right of action whatever, for he would take them subject to all the equities existing between the defendants and Tritle at the time of the assignment.

In this case, therefore, assuming the facts to be that the money was loaned to Haynes for the purpose of discharging the mortgage, and that there was no agreement on his part that it should be assigned to Gentry to secure his loan, the payment of the money to Tritle extinguished the mortgage, and the court ruled correctly in refusing to order the premises sold to satisfy the claim of plaintiff. If, however, there was an agreement between Haynes and Gentry, at the time the loan was made, that the Tritle mortgage should be assigned to Gentry as security for his loan, the assignment was properly made, and he, or his assignee, would have the right to have the mortgaged premises sold to satisfy his claim against Haynes.

Whether any such agreement or undertaking, in fact, existed, it is impossible to determine from the record presented to us. The court finds:

“That on the 2d day of July, 1863, Abner Gentry loaned to the defendant Haynes the sum of five hundred and fifty dollars, for the purpose of liquidating and extinguishing the note and mortgage held by Tritle; and that subsequently and long after their maturity, Gentry obtained an assignment of them to secure the repayment of the money loaned by him to Haynes.”

From this finding, it would appear that the note and mortgage were not assigned to Gentry until after they had been discharged and paid by Haynes; the record, therefore

Opinion of Lewis, C. J., on rehearing.

As it is presented to us, shows no error on the part of the court below in refusing to order the mortgaged premises sold to satisfy the plaintiff's claim; hence, it becomes our duty to affirm the judgment, for the presumption is always in favor of the regularity of the proceedings of courts of record. To entitle him to a reversal of the judgment, the appellant should always affirmatively show error. (*Rabe v. Wells*, 3 Cal. 151.) This has not been done. The judgment must be affirmed.

BROGAN, J., did not participate in this decision.

*OPINION UPON REHEARING. [*56]

PLEADINGS—ADMISSION IN, MUST PREVAIL OVER FINDINGS.—The answer admits the assignment of the mortgage to Gentry as security for the money advanced. This admission must prevail over the findings of the court to the contrary.

FORECLOSURE OF MORTGAGE.—A stipulation as to amount of judgment does not preclude the court from entering the necessary decree to enforce the payment by sale of mortgaged property.

PLEADINGS—NO LEGAL DEFENSE IN ANSWER.—The complaint avers the mortgage was not paid, and that it was regularly assigned. The answer denies neither of these allegations, and sets up no legal defense. On such pleadings, the plaintiff is entitled to his decree, although it seems from the facts found, the defendant had a perfect defense against the mortgage claim, which, however, he utterly failed to set up. (By BRATTY, J.)

By LEWIS, C. J.:

In our former opinion in this case we affirmed the judgment of the court below, because we discovered no evidence in the record to show that there was any agreement or understanding between Haynes and Gentry that the mortgage held by Tittle should be assigned as security for the money loaned by Gentry to discharge it, and upon the finding by the court, from which it was inferable that there was no such agreement. But upon the rehearing, our attention is called to the fact that the defendant, by his answer, admits that the mortgage was in fact assigned to Gentry, the plaintiff's assignor, for the purpose of securing

Opinion of Beatty, J., on rehearing.

to him the repayment of the money loaned by him. This fact escaped our attention upon the original examination of the case, but since our attention is called to it, we observe that the admission of the assignment is full and complete, and therefore the plaintiff is entitled to a sale of the mortgaged premises to satisfy his judgment. The stipulation between the parties that judgment might be entered for a certain sum of money is no waiver of the right to foreclose the mortgage. The stipulation, as we look upon it, is merely a settlement of the amount which was legally due the plaintiff, and not a waiver of his right to a decree of foreclosure. Neither would the finding of fact by the court below prevail against the admission of the answer. The findings of fact are subordinate to the admissions [*57] of the parties litigant *in their pleadings. The court below will therefore order a sale of the mortgaged premises, to satisfy the judgment rendered in favor of the plaintiff.

By BEATTY, J.:

I concur in the present opinion, because the complaint alleges that the note and mortgage were not paid when the suit was brought, and that nothing had been paid thereon, except the certain sums credited on the back of the note. It also alleges a regular assignment of the note and mortgage to plaintiff.

The answer admits the execution and assignment of note and mortgage, and does not allege that the note was paid or discharged before assignment. The answer does not pretend to set up any defense to the entire note, but simply attempts to show that the judgment should not exceed five hundred and fifty dollars. Defendants have no right to complain that judgment has gone against them and their property for that which they, at least, indirectly admit to be due and a lien on the premises mortgaged. At the same time, it would appear, from the findings of facts, that the defendants had a good legal defense to the entire note and mortgage, if it had been properly set up. If the facts are, as they seem to be shown by the findings, plaintiff's assignor

Opinion of the Court—Lewis, C. J.

ad a good cause of action for money loaned to defendants, at none on the note and mortgage. No injustice or wrong, however, is done the defendants by ordering the sale of the property. They are only made to pay what they owe. There is certainly no moral wrong done in making the property responsible under the peculiar circumstances of this case. The money was advanced, without interest, to remove a much heavier and more burdensome incumbrance from the property.

If there was any legal objection to this sale, the defendant has failed to set it up, and cannot complain.

BROSNAN, J., did not participate in this decision.

V. H. LAMBERT, RESPONDENT, v. W. D. McFARLAND
ET AL., APPELLANTS.

[2 NEVADA, 58.]

REPLEVIN—FORM OF JUDGMENT.—In an action of replevin, the judgment must be for the return of the property, and an alternative judgment for its value if not returned. An absolute judgment for its value, not allowing defendant to satisfy the judgment by return of the property with costs and damages, is erroneous.

APPEAL from a judgment rendered by the District Court of the Second Judicial District, Hon. S. H. WRIGHT presiding.

Wallace & Flick and A. C. Ellis, for Appellants.

Wm. Patterson and P. H. Clayton, for Respondent.

By the Court, LEWIS, C. J.:

Replevin to recover one hundred and twenty-eight head of cattle, particularly described in the complaint, together with the sum of one thousand dollars damages, which the plaintiff alleges he suffered by the wrongful taking and withholding of his cattle by the defendants. The record shows that the cattle were not delivered to the plaintiff by the

Opinion of the Court—Lewis, C. J.

sheriff, but continued in the possession of the defendant, and were under his control at the time of the trial.

The jury found the following verdict in favor of plaintiff:

"We, the jury in the above entitled case, find a verdict for the plaintiff, and assess the damages at thirty-one hundred and thirty dollars," upon which the court ordered judgment to be entered in accordance therewith.

Defendants appeal. The verdict and judgment are clearly erroneous, and must be reversed. In an action of replevin,

or for the claim and delivery of personal property, [*59] under the modern *practice, if the property be in the possession of the defendant, the value of the property must always be found in the verdict, and the judgment must be in the alternative that the plaintiff recover the property sued for, or in case delivery cannot be had, then for its value.

It is not optional with the plaintiff in such case to take judgment for the value of the property absolutely.

The primary object of this action is the recovery of the property, and judgment for its value in damages is only authorized when a delivery of the property itself cannot be had. Though the phraseology of section 200 of the practice act, prescribing the form of the judgment in these cases, is somewhat ambiguous and its purpose uncertain, subdivision four of section 210, respecting the execution, removes all uncertainty as to the form of the judgment. It provides that "if it (the execution) be for the delivery of the possession of real or personal property, it shall require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the sheriff to satisfy any costs, damages, rents or profits recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered to be specified therein, *if a delivery thereof cannot be had.*"

An execution in the alternative, as prescribed by this section, could not be issued upon any absolute judgment for a certain sum of money. It is quite evident, therefore, that it

Points decided.

was the intention that the judgment should be in the alternative, that is for the return of the property, or if return hereof cannot be had, then for the value. But as this precise question has been fully considered and determined by the court of appeals of the state of New York, in the case of *Fitzhugh vs. Wiman*, 15 Seld., 559, we deem it unnecessary to give it any further consideration. In that case, the court held upon provisions of the code which are in the exact language of the sections of our practice act above referred to: "That in this species of actions, judgment for the value of the property can only be taken in connection with judgment for the recovery of the possession as an alternative, depending upon the ability of *the sheriff [*60] to find and deliver the property itself upon the execution."

The verdict and judgment in this case were therefore erroneous, and must be reversed.

BROSNAN, J., did not participate in this decision.

W. H. RHODES, RESPONDENT, v. J. F. O'FARRELL,
APPELLANT.

[2 NEVADA, 60.]

TAXES ARE DEBTS.—A judgment which is personal against the taxpayer, and in rem against real estate, is a debt within the purview of the act of Congress, which makes certain United States notes a legal tender for debts. (By BEATTY, J.)

TAXES ARE NOT DEBTS.—Taxes are not debts within the purview of the act of Congress referred to. (By BROSNAN, J.)

JUDGMENT FOR TAXES BECOMES A DEBT.—But if the state goes into court and obtains a judgment for these taxes against the person of the taxpayer, this personal judgment becomes a debt, and like other debts may be discharged in paper. (By BROSNAN, J.)

APPEAL from the District Court, First Judicial District,
Hon. R. S. MESICK presiding.

The facts are stated in the opinion.

D. Corson, for Appellant.

Opinion of the Court—Beatty, J.

IV. II. Rhodes for Respondent.

By BEATTY, J..

In this case a judgment was obtained against Rhodes and his interest in a certain piece of real estate for some [*61] two hundred and *forty-eight dollars, sixty-six cents due for taxes on said real estate for the year 1866 Rhodes tendered to the defendant, who is tax collector for Storey county, the amount of the judgment and costs in United States legal tender notes. Defendant refused to accept them, the judgment rendered being in form for gold coin.

Thereupon Rhodes filed his bill to stay the sale and execution, and compel the defendant to accept the legal tender notes. The court below ordered the defendant to accept the notes and satisfy the judgment. Defendant appeals to this court.

The only serious question for this court to determine whether a judgment for taxes which is both a personal judgment against the taxpayer, and in the nature of a judgment *in rem* against his real estate, is a debt within the purview of the act of Congress which declares such notes shall be a legal tender for all debts, public and private.

In the case of *Perry v. Washburn* (20 Cal. 318), the counsel for respondent cites various authorities (see page 33) to show that taxes are not debts.

A portion of these authorities are not within our reach but I have examined all to be found in the state library and none of them either establish, or in my judgment, tend to establish such a proposition.

Chief Justice Field, in delivering the opinion of the court in the same case, says: "Taxes are not debts with the meaning of the act of Congress which declares that government notes shall be a legal tender for all debts, public and private."

He then asserts that a debt is a sum of money due by contract express or implied, and argues taxes are not due by contract. If his premises were correct I should not be disposed to question his deduction.

Opinion of the Court—Beatty, J.

ut I am clearly of the opinion debts are not confined to obligations for the payment of money arising on contract. I understand the term debt, it means an obligation or liability to pay a sum certain, and it makes no difference how that liability arises, whether it be by contract or imposed by law without contract. Whether such an obligation or liability should be evidenced by a promissory note, judgment rendered for trespass or slander, whenever it becomes a legal liability for a definite sum of money due from one person, corporation or government, to another, it is technically a debt. Some courts have held that all judgments (even a judgment for damages) are contracts, because the law presumes an implied promise on the part of those against whom the judgment is rendered to pay the same. Others, in defining contracts, confine the term to those obligations and promises which are the result of mutual and voluntary agreement, and do not include judgments within the class of contracts. I do not settle this proposition as you may, it does not change the case. If the word contract is to have such an extensive signification as to include all judgments it would certainly include taxes, for it would certainly be as reasonable to suppose the law raises an implied promise on the part of the taxpayer that he will pay what is due to the State, as that he will pay a judgment which was rendered against him for slander, trespass, or any other tort. If, however, we give a more limited and restricted meaning to the term contract, then there are many debts which are not the result of contracts.

All judgments for money are debts under any definition of the word given in the books, and the writer of this opinion thinks all taxes which are payable in money, become fixed obligations, and may be the foundation of a personal action against the tax-payers, are debts, and as such may be discharged by the tender of the United States legal tender money.

That the state may impose taxes that could not be paid in United States notes, I do not question. She may impose property duties and sell the stamps only for gold. In such

Opinion of Brosnan, J., dissenting.

case, if the stamps are not delivered until the gold is there is no debt. So the state may impose licenses on certain business, and require all persons before following business to pay a license in gold. If the license is issued until the gold is paid, there is no debt. The state, all individuals, is bound to take paper for a debt. An individual is not bound to sell any commodity for gold. A flour merchant may refuse to sell his flour for paper for gold. He may refuse to part with his flour, and get horses or cows in exchange. If no credit is given, he will have no difficulty in carrying out his intention.

But if it ever becomes necessary to enforce a lien [*63] by a money judgment against the delinquent, the judgment becomes a debt and may be paid in gold.

Respondent ought not to be restrained from selling the tender is kept good.

As it does not appear from the transcript whether a tender has been done or not, the court will retain this case until that is ascertained. Upon the respondent producing satisfactory evidence, either by receipt of appellant, or certificate of the clerk, that he has either paid the tax, or tendered to the appellant, or that he has deposited the tax with the court subject to the disposal of the appellant, the judgment of the court below will be affirmed, with costs.

By BROSNAN, J.:

From so much of the opinion of my brother BREWER, it holds, or in the slightest degree intimates, that *taxes* are *debts* within the purview of the act of Congress denoting a legal tender for all debts, public and private. I most respectfully dissent. A tax fails to possess the characteristics of a debt, as that term is usually understood when used in statutes, or even in its more enlarged acceptance in law generally.

It is not incurred or created with the consent of the taxpayer. Indeed, it is often imposed upon him *in spite of* him. Nay, more, it is sometimes imposed upon him by the will of majorities, themselves not taxpayers, and that, to the objects to which the taxpayer may be opposed.

Opinion of Brosnan, J., dissenting.

A tax is not the subject of attachment or set-off as an ordinary debt. It is a duty, a pecuniary charge imposed by government for public purposes, whether the subject is willing or not. He has no option to decline the burden. Its existence depends upon legislative power and action, and is obligatory without the assent of the individual. I submit that I am supported by the authorities in this view. It is so decided by the supreme court of California. (20 Cal. 8. See also, 3 Met. 520; 11 Id. 135; 5 Gray, 533.)

The case in 3 Metcalf was this: A schoolmaster had a claim against the city of Boston, which he assigned. The assignee brought suit, and the defendant attempted to set off a tax which had been assessed upon him. The set-off was not allowed, on the ground that the tax [*64] is not a debt due by contract nor by judgment. This was recognized as good law in the case. (11 Met. 135, *pra.*)

The case above cited, from the same state (5 Gray, 533), is this: A citizen was arrested and imprisoned for non-payment of taxes, after the passage of an act abolishing imprisonment for debt. A *habeas corpus* was issued to obtain his release, upon the ground that the tax was a debt, and that the prisoner was entitled to the benefit of the act. But the court held that the act did not compass taxes, they not being debts, and the prisoner was remanded to custody. I am therefore deliberately of the opinion that the act of Congress, declaring that all debts, public and private (except, etc., etc.), may be discharged by legal tender notes, is not the most remote reference or application to taxes levied under state laws for state purposes. So believing, I include that taxes, as well as stamp duties, and charges for licenses to transact business, may be collected in coin, notwithstanding the present legislation of Congress, if the legislative department of the state government see proper to collect them.

The case under consideration, however, is embarrassed by the conceded fact that a judgment has been recovered in court of law against the respondent, the taxpayer.

According to my understanding, this entirely changes the

of one dollar by the ordinary process of a suit at
at a cost to the delinquent taxpayer of from twenty
dollars, which is of no benefit to the state, as is
patent fact; and if in doing this the state recov-
ment, I can perceive no satisfactory reason wh
judgment may not be satisfied by payment of the
legal tender notes of the United States.

Upon this ground alone, that such judgment is
concur in the opinion affirming the judgment of th
court.

LEWIS, C. J., did not participate in this decisior

W. H. BRUMFIELD, PETITIONER, v. THE BO.
COMMISSIONERS OF DOUGLAS COUN
SPONDENT.

[2 NEVADA, 65.]

COUNTY COMMISSIONERS—RECKIVING BIDS.—The act creating a si
for Douglas county, and regulating the mode of advertisem
receipt of bids “until the next regular meeting of the boar
commissioners of said county thereafter,” does not authorize
or consideration of a bill filed with the treasurer on the day
regular meeting, but at a time subsequent to the meeting a
ment for that day.

IDEM—NOT A COURT.—The board of county commissioners is not

By the Court, BEATTY, J.:

This was a proceeding by *certiorari*, to review certain proceedings of the board of commissioners of Douglas county.

The facts of the case are as follows: On the 23d of February, 1865, an act of the legislature was approved creating a sinking fund for Douglas county, and providing that when there is money in that fund the treasurer shall advertise for bids by parties holding the indebtedness of the county, proposing to exchange that indebtedness for money on hand—those who will surrender claims on the most favorable to the county to have the money in the fund.

The act provides that the treasurer shall advertise for sealed proposals, to be received by him “until the next regular meeting of the board of county commissioners of said county thereafter.”

On the first day of the next regular meeting the board of commissioners, together with the auditor and treasurer, to examine the bids and distribute the funds to those entitled. Prior to the first day of January, 1866, the treasurer of the county did advertise for bids, and in the latter part of December a number of bids were regularly [*66] delivered to him, and filed in his office. Among these, were several bids made by the petitioner in this case.

The commissioners met on the first Monday of January, the law requires. But that being the first day of January, and a holiday, they adjourned over to the second, without doing any business on the first. After the board adjourned on the first, the treasurer received from the post-office an additional bid for the surrender of county indebtedness. When the board met on the second of January, the question arose whether they could consider that bid which was received by the treasurer on the first, after their adjournment, or whether they must confine themselves to the bids made before their meeting on the first. They first determined to reject the bid received on the first, but after-

Opinion of the Court—Beatty, J.

wards reconsidered this vote, and did consider this last bid, awarded a part of the money to the last bidder, and thereby deprived the petitioner of some eight hundred dollars which he would have received had this latter bid not been considered. Thereupon the petitioner obtained a writ from this court directed to the commissioners, requiring them to show by what authority they took into consideration a bid made after the meeting of the board. The language of the statute is, that the advertisement shall be for sealed proposals until the next regular meeting of the board. We do not think it was intended that the board should act on any bids except those made in response to the advertisement. Bids received until the next regular meeting could not include those bids received after such meeting.

If the board could act on bids made after their meeting, it would defeat the objects of the law in requiring the proposals to be sealed when made.

But it is claimed that Monday, being a non-judicial day, the board was not regularly in session that day, and that the second of January was the first day of their regular and lawful meeting for that month. An act of the territorial legislature, still in force, provides: "No court shall be opened, nor shall any judicial business be transacted on Sundays or New Year's Day," etc.

Considering it a court, either the meeting on the [*67] second was the *first regular day of meeting, or else there was no lawful term that month. But we are of opinion the law last referred to does not have any application to the board of commissioners. We do not hold that such board is a court. The Constitution says the judicial power of the state shall be vested in a supreme court, district courts, justices' courts, and that the legislature may establish courts for municipal purposes only. This body, then, is not a court, as defined by the Constitution. We do not think their meeting on the first of January should be held a nullity. If we are correct in these views, the court had no authority to consider or act on bids received by the treasurer after the adjournment of the board on Monday, the first of January.

Opinion of the Court—Lewis, C. J.

It is therefore ordered and adjudged that the action of the board in considering bids filed with the treasurer after adjournment on the first of January was void and without authority, and the board are commanded to set aside orders and proceedings made in relation thereto, and refrain from making any order for the payment of money such bid or bids.

S. DILLEY, APPELLANT, v. CHARLES L. SHERMAN,
RESPONDENT.

[2 NEVADA, 67.]

STATEMENT—ACTUAL DAMAGES NEED NOT BE PROVEN.—In an action of ejectment it is not necessary for the plaintiff to prove that he has suffered actual damage by the ouster of defendant.

HE.—RIGHT OF POSSESSION.—*Held*, that to entitle plaintiff to recover in an action of ejectment, it was only necessary to prove title and immediate right of possession in himself, and the occupancy by defendants of the premises described when suit was brought.

APPEAL from a judgment of the District Court of the Third Judicial District, the Hon. WM. HAYDON presiding.

Action brought to recover a certain water right and mill site, situate in Gold Cañon, Silver City.

**F. H. Kennedy and R. M. Clarke*, for Appellant. [*68]

H. M. Steel, for Respondent.

By the Court, LEWIS, C. J.:

As the appellant's statement and respondent's counterstatement on appeal in this case came before us, without being engrossed, we are unable to determine the merits of the plaintiff's claim; neither can we determine whether the verdict of the jury is sustained by the evidence. But, upon the following instruction, which appears from the record to have been given by the court below, the judgment must be reversed: "The jury are instructed that the plaintiff, in order to recover in this action, must prove that he was entitled to the premises and waters, and that the defendant

Opinion of the Court—Lewis, C. J.

damaged him by the diversion of said water from his premises."

That, to entitle the plaintiff to recover in an action of ejectment, he must show that he is entitled to the possession of the premises, there can be no doubt; but that he is not required to show that he is also entitled to the enjoyment of any stream of water which may run through it; or that he was damaged by the diversion of it by the defendant, is equally clear.

The primary object of the action of ejectment is [*69] the recovery of the *possession of real property; and originally, only nominal damages were ever recoverable in it. The real damages was recoverable only in an action for mesne profits (1 Chit. Pl. 192); and it has never been held necessary, in an action of ejectment, for the plaintiff to prove that he has suffered actual damage by the ouster of the defendant.

At common law, when the title of the real plaintiff was controverted, it was only necessary to prove: 1. That he had the legal title to the premises at the time of the demise laid in the declaration. 2. That he also had the right of entry. 3. That the defendant, or those claiming under him, were in possession of the premises at the time when the declaration was served. (2 Greenl. Ev., §303.) Notwithstanding section 64 of our practice act authorizes the recovery of mesne profits, and damages for waste committed on the premises in the action of ejectment, yet it by no means makes it necessary for the plaintiff to prove damages to entitle him to recover the possession of the premises. Under the present practice, if the plaintiff proves the right of possession in himself, and the withholding of the premises by the defendant at the time the action is instituted, is sufficient to entitle him to a recovery. (*Payne v. Treadwell*, 16 Cal. 220.)

It was stated by counsel, upon the argument of this case, that some of the instructions which appear in the record of this case belong to another case between the same parties, and that they were not given by the court below in this case. This may be so, but no steps have been taken to correct the

Opinion of the Court—Brosnan, J.

record, and we cannot look beyond it for facts upon which to determine this appeal. We find other erroneous instructions in the transcript, which counsel for defendant asked to be given to the jury, but whether they were so given or not does not appear from the record; we must therefore presume they were not, in obedience to the rule that all presumptions are in favor of the regularity of the proceedings of courts of record.

The judgment of the court below must be reversed, and a new trial ordered.

BEATTY, J., did not participate in this decision.

C. A. LOW, APPELLANT, v. S. A. BLACKBURN,
RESPONDENT.

[2 NEVADA, 70.]

DECREES IN EQUITY—CONFINED TO PLEADINGS.—In equity, no decree can be made in favor of a party upon grounds not set forth in the pleadings.

DECRETES TO QUIET TITLE.—Decrees in equity to quiet title should be against all parties to the suit standing in the same relation to the property.

APPEAL from a decree rendered in the District Court of the First Judicial District, the Hon. CALEB BURBANK presiding.

Williams & Bixler, for Appellant.

L. Aldrich, for Respondent.

By the Court, BROSNAN, J.:

This is a suit in equity instituted to quiet the title to a certain interest (viz.: one-tenth) in mining ground known as the "Crown Point Claim." The material facts and allegations in the complaint, so far as necessary to a full understanding of the case, are substantially these: That at the commencement of the action, and for years anterior, the appellant, Low, was the lawful owner and in the possession of the property in controversy; that his title is founded upon a valid deed of conveyance executed by one Black-

NEW DEC.—39

Opinion of the Court—Brosnan, J.

burn in 1860, whereby and through mesne conveyance the estate (said one-tenth) vested in him, Low; that the defendant, Sarah A. Blackburn, is the widow of said Blackburn, and the defendant, Minnie Blackburn, is the daughter of the said Sarah and of the deceased John L. Blackburn, and an infant; and that the defendant Small is her duly appointed guardian; that the defendants unlawfully claim some interest or estate in said property (the guardian claiming on behalf of his ward) which claim beclouds and depreciates the value of said property.

[*71] *The complaint prays that Low be adjudged the only lawful owner, and that his title be quieted, and the defendants be barred and enjoined from further asserting any interest in or claim to any portion of said undivided one-tenth of said mining ground.

The answer, which is joint, simply "denies each and every allegation contained" in the complaint.

The case was tried by the court without the intervention of a jury, and no portion of the evidence is embodied in the record. We have, therefore, to determine the case upon the pleadings and findings of the district court as they appear before us. The court finds, in the first instance, as follows:

"That the plaintiff was, at the commencement of this action, and prior thereto, had been, and still is, the owner of the premises described in the complaint, and derails title thereto from John L. Blackburn, who died in the latter part of the year 1861."

The court also finds that the plaintiff was in possession of the property described in the complaint at the time the action was commenced. The court further finds, "that at and before the commencement of this action, the said defendants, Sarah A. Blackburn and B. F. Small, not being in possession, were asserting title to the premises aforesaid, adversely to the plaintiff, and under and by virtue of the title of John L. Blackburn, deceased, which is in the plaintiff," the said Sarah claiming for herself as widow, and the said Small claiming as guardian for his ward.

Had the case rested at this point, as we think it should

Opinion of the Court—Brosnan, J.

so far as we are advised by the record, there would be no impediment to a decree in favor of the plaintiff, the appellant in this court. Clearly, the facts thus far, not only authorized, but demanded such a result. The important allegations in the bill of complaint were true and established according to the findings of the district court, and as a legal, as well as a logical sequence, (if the complaint stated a sufficient cause of action as to which no question is made) the plaintiff was entitled to the decree.

It is declared to be the owner and in possession of the premises, and that the defendants—Sarah in her own right, Low, and Small, the only person who could assert the claim as the guardian of the infant—were claiming adversely to it. But the embarrassment of this case, if there is any, seems to arise from the introduction on [*72] of certain documentary evidence, the use or admissibility of which this court cannot understand from the record.

In the sixth finding of the district court it is stated, that at the time of the commencement of this action, several suits were pending between the defendant in this suit, Sarah Blackburn and others, concerning the premises in dispute and certain interests in the Yellow Jacket mine; and for the purpose of adjusting and settling all the matters in controversy, the attorneys of the respective parties met (the defendant, Sarah A. Blackburn, assenting), and entered into a written stipulation, the substance of which, for the sake of brevity, we state only so far as it affects the matter under consideration. In that document it was agreed, as to the title of John L. Blackburn to the undivided northern part of the "Crown Point claim" (the property involved in this case), it should be perfected in Charles L. Blackburn by sale, judgment, or otherwise, as the attorneys of the respective parties litigant may deem proper; and, therefore, that said Low should convey ten feet of said ground in the "Crown Point claim," free of incumbrances, to the plaintiff, Sarah A. Blackburn.

The court below next finds that the defendant, Sarah A.

Opinion of the Court—Brosnan, J.

Blackburn, ratified and adopted this stipulation, and that this suit was brought with her consent, upon the recommendation of the attorneys of both parties, as being the best means of carrying the aforesaid stipulation into effect.

Upon the foregoing facts, the district court ordered the entry of a decree declaring Low to be the lawful owner of the premises described in the complaint as against Sarah A. Blackburn and all persons claiming under her; and commanding him to convey ten feet of the ground, free of incumbrances, to the said Sarah. We think, the court, in making this order to convey, manifestly erred. In doing so, however, we believe the district judge was unquestionably influenced by the clause in the aforesaid stipulation, and a laudable desire to settle and determine the whole controversy, and thereby prevent any possible future litigation for the enforcement of that stipulation. But as the case stands, the agreement to convey the ten feet of ground could not be enforced at the time, even by a bill for a specific performance, for the reason that the conveyance was subject to a condition not yet performed. By [*73] the *agreement, Low's obligation to convey did not mature. He was to convey when his title should have been perfected. This was not yet consummated. On the contrary, the defendant, Sarah A. Blackburn, by her defense in this suit, is resisting the efforts of Low to place himself in the necessary position to convey to her a clear title pursuant to the terms of the stipulation. The perfecting his title to one-tenth of the whole claim, was a condition precedent to the executing a conveyance of the ten feet. And courts of chancery do not, under such circumstances, decree a specific performance.

If this relief be refused in a case where a complaint is filed for that special purpose, there can be no reason or authority for granting it upon an answer.

But this case stands in a still worse light. The answer prays for no affirmative relief. Neither does it advance a single fact or statement upon which the court would be authorized to grant such relief. Even in equity, where technicalities are mostly discountenanced, a party can have relief, if at all, only upon the allegations in the pleadings.

Opinion of the Court—Brosnan, J.

No decree can be made in favor of a party upon grounds set forth in his complaint or answer. The rule is absolute, in chancery, that a party can only recover upon the case he presents. *Secundum allegata et probata*. (*Bailey v. Alder*, 10 N. Y. 363, 370; *Byrnie v. Romaine*, 2 Edw. Ch. 6-7; *Beaty v. Swarthout*, 32 Barb. 293.)

Again, the decree under review, in our opinion, is erroneous in other particulars, and seems inconsistent with facts found by the court. As matter of fact the judge finds that the defendant Small, on behalf of the infant, asserts and claims title adversely to the plaintiff, yet the decree acquits him with costs in his favor; and in doing so necessarily gives him unbridled license to continue the assertion of such adverse claim. This ought not to be tolerated.

If the mother is legally restrained from asserting her adverse claim, so should any other person standing in the same relation to the property. The right which the infant claims is identical in all its features with that of the widow of deceased. The claims of both are joint for the same subject, derived from the same source, and equally unfounded (if not just) in the eye of the law. Under the facts and circumstances of this case, if the law will silence the claims of the one, it is but right as well as logical, that the same law will silence the claim of the other. As to this the guardian Small, stands in the same relation to this property, as regards his right to assert this adverse claim, as does Sarah A. Blackburn. And if he were permitted to do in his fiduciary character what the other defendant is restrained from doing, any decree made in this case would be shorn of its efficacy. All that would be necessary on his part would be to increase his industry in the slander of the title, and thus counterpoise the silence imposed by the law upon his co-defendant. Hence it follows that Small also should be restrained from setting up or asserting, as such guardian, any adverse claim to the property described in the complaint.

In conclusion, we glean from the record the following additional facts:

John L. Blackburn, in 1860, conveyed and transferred

Opinion of the Court—Brosnan, J.

this ground, and the court finds that the title so conveyed was in Low, at the commencement of this suit. Black died in 1861.

Then, if the deed of conveyance in 1860 was sufficient to transfer his title and interest, and this title was in Low at the time this suit was instituted, (which facts the court below found to be true,) it follows, as matter of law, that neither the widow, nor the infant, Minnie, has any estate or interest in the property in dispute. It is but proper, however, to say in this connection, that anything advanced in this opinion is not intended to affect or prejudice in the least degree any claim or equitable right to which the infant, Minnie Black, may be entitled. If she have any, the law will recognize it when she reaches her majority.

The decree of the district court is reversed, and the case is remanded for rehearing, with leave to the defendant A. Blackburn, to amend the answer so as to conform to the suggestions in this opinion, as to the stipulated facts of ground; each party paying their own costs on appeal.

BEATTY, J., being disqualified, did not participate in the decision.

DECISIONS
OF
THE SUPREME COURT
OF THE
STATE OF NEVADA.

APRIL TERM, 1866.

WILLIAM L. LOW, APPELLANT, v. CROWN POINT
MINING CO., RESPONDENT.

[2 NEVADA, 75.]

APPLICATION FOR A WRIT OF PROHIBITION.

OF PROHIBITION—WHEN MAY ISSUE.—An order of prohibition may issue from this court in a proper case to arrest the progress of a trial. It is such order should not issue when there is other and adequate remedy.

—OFFICE OF THE WRIT.—The office of such writ is not to correct errors but to prevent courts transcending the boundaries of their jurisdiction. **JUDGMENT—BUT ONE.**—There cannot be two final judgments in the same action.

—APPEAL FROM INTERLOCUTORY ORDER.—No appeal lies from an order made before final judgment, except in such cases as expressly authorized by statute.

—EQUITABLE AND LEGAL DEFENSES—HOW TRIED.—When there are two distinct defenses, it is not the proper practice to impanel one jury to try the equitable defense, and another the legal defense. It is, however, proper to keep the two defenses separate. The judge, himself, may hear and determine the equitable side of the case; or, if in doubt, he may submit special issues to the jury who are to try the law side of the case.

This case was pending in the District Court of the First Judicial District, before the Hon. RICHARD RISING, presiding.

Opinion of the Court—BROSANAN, J.

Aldrich & De Long, for Petitioner.

Williams & Bixler, against Petitioner.



[*77] *By the Court, BROSANAN, J.:

This action, while in progress of trial in the district court, was temporarily arrested by an order of prohibition from this court.

The power of the court to make such an order in a proper case is unquestionable, because it is expressly authorized and conferred by the Constitution of the state. (Art. 6, Sec. 4.) Nevertheless, the writ ought not to issue where there is another and adequate remedy. Properly speaking, the office of the writ of prohibition is not to correct errors, but to prevent courts from transcending the limits of their jurisdiction in the exercise of *judicial* but not ministerial power. (2 Hill, 367 *et seq.*; also Id. 363.) This application is made principally on the ground that no appeal lies in this instance, and therefore this court should quash the writ and permit the trial to proceed to a termination in the court below.

The facts, so far as necessary to be stated for a clear understanding of the single question before us, are these: The complaint is in ejectment and contains the usual allegations. The answer sets up a general denial and other defenses. It also sets up a strictly equitable defense. In this, that the asserted title or claim of the plaintiff is derived from, and through a deed of conveyance, absolute upon its face, but which in fact is claimed to be a mortgage to secure the payment of an antecedent debt—a defeasance having been executed and delivered contemporaneously with the deed.

The answer prays an affirmative relief, that the deed be declared by the judgment of the court a mortgage, that an account of the amount due thereon may be taken, and that the defendant be permitted to pay whatever amount may be found due, and thereby redeem the property from incumbrances.

Upon the trial the parties first proceeded to try the issues

Opinion of the Court—Broanan, J.

ed by this equitable defense, leaving the law branch of case to be afterwards tried. A jury was thereupon impaneled and sworn to try the equity side of the case. But issues were framed for submission to the jury, and it was that after the defendant had closed its evidence on the law branch of the case, the district judge withdrew the matter from the jury, on the ground, we presume, that this equitable defense had not, in his opinion, [*78] been sustained. That jury was discharged, and another was impaneled to try the issues of law. Meanwhile, upon the termination of the equitable defense in the order of the court, a decree, as if made upon a distinct and independent bill in equity, was signed by the judge, filed and entered. This judgment or decree adjudged, not only that the deed alleged to be a mortgage is an absolute deed, but it further declares that the premises described therein (property in controversy) were duly conveyed to the plaintiff. From this alleged decree, the defendant instantly took an appeal to this court, filing the usual notice of appeal and undertaking. Having done this, the court was applied to for a writ to stay the progress of the trial below until the appeal should be determined (the court below having rendered a continuance) upon the assumption, or rather understanding, that the appeal had taken the case bodily from the trial below, and deprived that court of further jurisdiction at the time being.

Upon full consideration of those facts, we have come to the conclusion that an appeal at present does not lie in this case—that no such final judgments as warrants an appeal have been entered, or could have been entered, at the stage of the trial when this alleged decree was entered. There must not be two *final* judgments in the same action, and each must be the subject of appeal. If there may be two, there may be more. Such practice, if tolerated, would encourage and multiply litigation, instead of preventing a multiplicity of suits and appeals, which is the plain and acknowledged intention and object of our code of procedure, as has been recently declared by the courts of the state from which this system has emanated. Another serious objection to the

Opinion of the Court—Brosnan, J.

exercise of this right of appeal, in the present condition of this action, presents itself. It is this: This action is one—single; and no matter how many intermediate orders, entries, or decrees (name them as you please) the court may make during its progress to a final determination of the right of the respective parties litigant in the principal subject matter, whenever the controversy is brought to an end, then the judgment becomes a finality, and should be one, single, like the action which it determines. It should, however, be so comprehensive as to dispose of and settle all material and disputed points presented by the pleadings, unless this course of practice be observed and followed. Aside from the objection already advanced, and others that might be mentioned, there must be embarrassment and difficulty in the introduction of a judgment record in evidence in any future action where its use and effect may be necessary. The judgment-roll is the first and best evidence in the way of estoppel or otherwise. Our statute declares of what that roll shall consist. It must contain the summons, the pleadings and judgment, and any orders relating to the change of parties. (Laws 1861, p. 347, Sec. 203.)

But if there be two final judgments in the same action, this statute cannot be complied with. We do not forget the fact that appeals may be taken from certain orders and decisions of courts before final judgment. But such are expressly authorized by statute, and this is not one of the enumerated cases. (Stats. of 1864, p. 81, sec. 30.) No appeal lies from an order made before final judgment, except in the cases specified in this statute. Therefore, regarding the alleged decree of the district court, as we do, of no more effect than simply as an order made in the cause, and not being embraced within those interlocutory orders declared appealable by the statute, we must hold the appeal to be ineffective, and of course inoperative in staying the trial.

A judgment is the “final determination of the rights of the parties in the action.” This is the definition given to it in the New York code, and it is defined in the very same

Opinion of the Court—Brosnan, J.

ords in our statute. (Laws of 1861, p. 338, sec. 144.) In support of our opinion that no final, and therefore no judgment that could be legally appealed from, has been rendered in this action, we refer to the following cases, determined under and since the New York code went into operation: (4 Coms. 415-16; 2 Kernan, 591-2; 5 Smith, 4-5.)

We might rest here, but in view of the mode in which the trial has been thus far conducted, it may be proper to make some further suggestions. Judging from the formality and character of what is called a decree in this case, it would seem as though there had been two distinct actions before the court. There could have been no possible necessity for such a course. This is not advanced with any view of measure as regards court or counsel, but because such mode of proceeding enhances—and that unnecessarily—the costs of the parties litigant, and because it is anomalous, and we think unprecedented, that different juries should be sworn to try different parts or issues in the same cause on the same trial. We do not, however, think it improper that in cases of this character, when an equitable defense is interposed, this particular defense should be first disposed of. Indeed, we have no doubt that the equitable defense should first be tried. The reason for this course is manifest to every tyro in the profession. But this could have been done, and we think it ought to have been done, by the judge sitting as a chancellor in the first instance; and if he was fully convinced as to the sufficiency or insufficiency of the equitable defense, he could exclude or receive it upon the trial of the legal issues as his judgment should sway. If he had doubts upon any points, the solution of which required the enlightenment of his conscience, he could have framed special questions of facts and issues, as they are technically denominated, to be answered by the jury trying the main cause. In this way, no matter how the general verdict may go—whether for plaintiff or defendant—if it be contrary to the effect of the special findings, or as they are sometimes called, special verdict, the general verdict must yield, and judgment will be en-

Opinion of the Court—Brosnan, J.

tered according to the force and legal effect of the special findings. The decree so called, to which allusion has been made, and which was supposed to be appealable, we think trenches upon the province of the jury as regards the legal side of the case. It goes too far in stating that the premises in dispute were duly conveyed to the plaintiff. The equitable question to be determined was whether the deed was not in fact a mortgage. That fact having been determined in the mind of the court, the trial could have proceeded, and whether an order declaring his conclusion had been entered or not, would have made no difference to the court in its ruling on the trial. But on this application we cannot modify or correct it, as it is not before us properly for review. It will be subject to the examination of the court, if the case should hereafter come before us upon appeal from the final judgment in the case.

The court was in the hopes of having longer time for the preparation of their written opinion in this case, [*81] their decision having *already been orally announced.

But upon the request of counsel, and from deference to that request, and especially in view of the fact that our opinion may aid somewhat in the trial of the cause now in progress, we have denied ourselves the leisure to present our views so elaborately and methodically as we would desire. However, we have no doubt as to the correctness of the conclusion at which we have arrived.

It follows that the writ of prohibition heretofore issued should be recalled and set aside.

It is so ordered; and the district judge is directed to proceed and try the aforesaid action.

The defendants will pay the costs on this appeal.

BEATTY, J., did not participate in this decision.

Opinion of the Court—Lewis, C. J.

HN C. SCOTT, RESPONDENT, v. THE BULLION MINING CO., APPELLANT.

[2 NEVADA, 81.]

QUESTIONS USED IN DIFFERENT CASES.—How TAKEN.—When two cases are pending in the same court, between the same parties, a deposition may be taken upon one notice, affidavit, and commission, to be read in both cases.

N.—A deposition taken in one case may be used between the same parties in another; so a deposition entitled in two cases between the same parties may be used in either.

N.—When TAKEN TWICE.—Where the deposition of the same witness is taken twice, and it appears that the first examination covered the whole ground of controversy, and was regularly taken, the court might refuse to hear the second deposition. But the regular method would be to appear and contest the issuance of the second commission.

APPEAL from the District Court of the First Judicial District, Hon. R. S. MESICK presiding.

Williams & Bixler, for Appellant.

C. E. De Long, for Respondent.

*By the Court, LEWIS, C. J. :

[*82]

The principal question involved in this appeal, and the only one which we deem it necessary to pass upon, arises on the ruling of the court below in rejecting the depositions of Harter and Forcade. The objection urged against their admission, by counsel for plaintiff, was, that the affidavit, notice, and commission upon which the depositions were taken, were all entitled in two different actions, viz.: *In C. Scott v. The Bullion M. Co.*, and *The Bullion M. Co. v. John C. Scott*.

These two actions, it appears, were pending in the same court at the same time: the one an action for ejectment brought by Scott to recover a certain interest in the Bullion Company's mining ground, *and the other an action [*83] for quiet title brought by the Bullion Company against Scott. The defendant, wishing the testimony of Harter and Forcade, who were residing in the state of California, made application for a commission for their examination. The

Opinion of the Court—Lewis, C. J.

notice of application, the affidavit of James M. Walker, upon which the application was made, and the commission, are all entitled, as before stated, in both actions. The notice informed the plaintiff, that upon the 9th day of March, A. D. 1865, application would be made to one of the district judges of the county of Storey for a commission to take the deposition of Isaac M. Harter and Jacob Forcade in the two actions then pending between the plaintiff and defendant in the district court of Storey county, i. e., *Scott v. Bullion Company* and *The Bullion Company v. Scott*, and the commission directs the commissioner to take the depositions of Harter and Forcade in answer to the interrogatories annexed, as witnesses in the two actions above mentioned. No cross-interrogatories were filed by the plaintiff. The depositions were taken and properly returned, but upon the trial, counsel for plaintiff objected to the reading of them, for the reason before stated. The objection was sustained, and this ruling is assigned as error. The objection was not well taken, and, in our opinion, the court below erred in rejecting the depositions. Though the issuance of one commission in two or more cases, situated as these are, may not be commendable practice, we cannot say that it is not a substantial compliance with the statute. Section three hundred and eighty of the practice act provides the manner in which the deposition of a person not residing in the State may be taken. That it shall be upon "commission issued from the court under the seal of the court upon an order of the judge or court, or probate judge, on the application of either party, upon five days' notice to the other." "It shall be issued to a person agreed upon by the parties, or, if they do not agree, to any judge or justice of the peace selected by the officer granting the commission, or to a commissioner appointed by the governor," etc. Unless it is claimed that a commission to take testimony in two actions is a commission in neither, it would seem that the proceedings to obtain the depositions in question were in substantial compliance with section three hundred and eighty.

The notice itself is unquestionably sufficient in [*84] either of the cases. *How, therefore, merely making

Opinion of the Court—Lewis, C. J.

notice in both, destroys it so that it is a notice in *per*, we cannot see.

Hence, in our opinion, notice was given in both actions. Affidavit was also made in both, and the commission orizes and directs the commissioner to take the deposition in both cases. True, there was but one notice, one affidavit, and one commission in both cases, but the notice, affidavit and commission were all so formed as to answer the requirements in both actions, and the mere fact that there was not a distinct set of these papers in each case could not prejudice the parties interested when the requirements of the law are substantially met by one set, as in this

it there is another reason for this view of the question. Taking of testimony by deposition is purely a chancery practice, and was never recognized in the courts of law. The innovation of the modern practice.

The common law recognized no testimony except such as delivered *viva voce* in open court, whilst the courts of chancery have always possessed and exercised the power to issue commissions for the examination of witnesses, and the manner of executing the commissions and returning the depositions depended upon the rules and practice of the court rather than upon any statutory provisions. (*Brown v. South*, 9 Paige, 350.) When, therefore, this practice of issuing commissions for the examination of witnesses and taking depositions is extended to courts of law by statute, the same rules which govern the courts of chancery in regulating them should also be recognized by the courts of law in the absence of any direct statutory provisions. For it is to us the most obvious suggestion of reason, that if the statute confers upon the courts of law any chancery powers, the same rules by which the powers were exercised by courts of chancery should govern the courts of law in the exercise of them. The statute, of course, so far as it prescribes the mode of procedure, must be strictly complied with; but beyond that, and in the absence of any statutory rules, the rules adopted in the courts of chancery should govern. Our statute only prescribes the manner in

Opinion of the Court—Lewis, C. J.

which depositions may be taken, and we are compelled to resort to the practice in chancery for the rules governing the use of them when so taken. So far as the statutory requirements are concerned they have been followed.

[*85] If then, by *the practice in chancery, the depositions of Harter and Forcade would be admissible, they were so in this case on the trial in the court below. It is an old rule in chancery that a deposition in one suit may be used in another between the same parties, where the same question is involved in both. (2 Dan. Ch. Pr. 1011, 2 A. K. Mar. 525.) Surely we can see no reason why one deposition which is taken in two cases cannot be used in either. Under that rule it was of no consequence what the title of the action might be in which the deposition was taken, to entitle a suitor to use it in another and entirely different action between the same parties—it was only necessary to show that both suits involved the same question.

There seems to be no good reason, then, why a deposition bearing the title of two actions should not be used in any action involving the same question between the same parties, and certainly not in either of the actions in which it was, in fact, taken. The case of 7 Monroe, 576, seems to be directly in point, sustaining our view of the question; and we do not now see sufficient reason to justify us in disregarding its authority in this case.

There may have been good reasons for rejecting the second depositions, but none appear in the transcript.

The ground taken by the court below for its ruling is utterly untenable. If the first depositions were full and complete, covering all the points in the case, and there was no legal objection to their being used on the trial, it would have been proper for the court to reject the second depositions and allow the first to be used; although the better practice in such cases would be to appear and object to the issuance of the second commission. In this case, had it been shown that the first depositions contained a full and complete examination of the witnesses, and that there was no legal objection to their being used, we could not say that the court below erred in ruling out the second deposi-

Points decided.

This is not, however, shown; and from the testimony and facts before us, it is impossible to say that the writ was not issued for the purpose of taking the testimony upon some question omitted in the first depositions, for the purpose of making some point more clear or ex-

plains the reason upon which the court below rejected the writ and deposition is untenable, and no other appearing on the transcript, we are compelled to reverse the judgment and award a new trial, and it is so ordered.

MAYOR AND BOARD OF ALDERMEN OF THE CITY OF VIRGINIA, APPELLANTS, v. THE CHOLLAR-POTOSI GOLD AND SILVER MINING CO., RESPONDENT.

[2 NEVADA, 86.]

SECTION 1 AND 8 OF ARTICLE VIII CONSTRUED—GENERAL AND SPECIAL MUNICIPAL CORPORATIONS.—The court in construing these sections. *Held*, that section 8 is inoperative until acted upon by the legislature. That section 1 means that the legislature shall pass general laws for the formation of corporations; but that no corporation, except for municipal purposes, shall be created by special act.

CITY A MUNICIPAL CORPORATION.—The city of Virginia was a municipal corporation when the Constitution was adopted, and has never ceased to be a corporation. The law amending the charter is, therefore, constitutional.

PRODUCTS OF MINES SUBJECT TO TAXATION.—The products of mines are real property, and as such subject to taxation for municipal purposes.

PROPERTY REMOVED BEYOND CORPORATE LIMITS.—All property within the municipality is subject to one annual taxation, and it makes no difference that it is removed beyond the corporate limits before the rate of tax is specified, or the mode of collecting established.

EQUALITY OF TAXATION.—The Constitution requires that all *ad valorem* taxes shall be as nearly equal as may be: *Held*, that the mode of assessing the proceeds of mines does not violate that principle of equality.

POWER OF REFUSING INFORMATION.—The municipal authorities of the City of Virginia may add a penalty for refusing to give the assessor the information to enable him properly to assess the products of a

[1] *State of Nevada, ex rel. Joseph Rosenstock, v. S. T. Swift*, 11 Nev. 27; 4 Nev. 173.

[2] 3 Nev. 173; 4 Nev. 178, 319.]

APPEAL from the District Court of the First Judicial District, Hon. R. S. MESICK presiding.

The facts are stated in the opinion.

Clark Churchill and McRae & Rhodes, for Appellants.

Hillyer & Whitman, for Respondents.

[*88] *By the Court, BEATTY, J.:

This was a suit brought for the collection of municipal taxes alleged to be due from the defendant to the city of Virginia for taxes on the products of a mine.

Virginia was a city existing under territorial law when the Constitution was adopted. In March, 1865, the state legislature passed a law rechartering the city, and repealing the former law granting a charter, so far as it was inconsistent with the new act of incorporation. Sec. 17 of the act of March, 1865, empowers the board of aldermen "To levy and collect taxes on all property within the city, both real and personal, made taxable by law, for state or county purposes." Sec. 20 of the same act authorizes the board to provide by ordinance the manner of assessing and collecting taxes.

The first election under the new charter took place the first Monday in May. The new officers qualified the second Monday of May. The board of aldermen in the month of September following passed an ordinance prescribing the mode of assessing and collecting taxes.

That ordinance provided for a quarterly assessment and payment of the tax on the proceeds of the mines; the first quarter to commence the last Monday of May, and end the last Monday of August, 1865. The ordinance in prescribing the manner of assessing the taxes on the proceeds of mines follows the same course prescribed by the state legislature for assessing them for state purposes. That is in substance to ascertain the amount and yield of ores for each mine for one quarter, to deduct from the gross yield first twenty dollars per ton; then to deduct from the remainder one-fourth, or twenty-five per cent., and to assess the remaining three-

things at the same *ad valorem* tax as other property. The complaint sets out all the foregoing facts, and many other facts to which it is not now necessary to allude, as the contested points in the case will be explained by the foregoing statement and such *additional facts as we [*89] will be obliged to allude to in the course of this opinion.

The court below sustained a demurrer to the complaint, and entered judgment for defendants, and the plaintiff appeals to this court from the judgment rendered by the court below.

We will follow the counsel of respondent in noticing the different grounds on which they claim the judgment must be sustained.

First, it is claimed that the city of Virginia is not a corporation, and its aldermen have no municipal powers, for the reason that the law of March, 1865, granting the new charter, is void, because it is in conflict with Constitutional provisions. Sec. 8, article 8, of the Constitution is in these words: "The legislature shall provide for the organization of cities and towns by general laws; and restrict the powers of taxation, assessment, borrowing money, contracting debts and loaning their credit, except for procuring supplies of water."

Here is a requirement of the legislature to do a certain thing, to pass a general law on a certain subject. This provision of the Constitution remains inoperative until the legislature performs its duty; at least it remains inoperative so far as any positive effect is to be given to it. But it may be contended that it has a negative effect—that it raises an implied prohibition against the legislature passing any special law for organizing cities or towns. Although there are no negative terms in the clause, if it stood alone and was not qualified by any other clause, we would certainly be inclined to hold that such was the intention and effect of the section. Otherwise it would be useless, for if the legislature first passes a general law, and then goes on to pass a special law, organizing each new town or city as it comes to existence, the general law would be a dead letter in the

statute book. Doubtless the framers of the Constitution intended that section of the organic law to have beneficial effect. But there is another section of the Constitution, *to wit*: section 1, of article 8, which we settle this question. That section reads as follows: 'legislature shall pass no special act in any manner relating to corporate powers, except for municipal purposes; and corporations must be formed under general laws; and such laws may, from time to time, be altered or repealed.'

[*90] *The expression, "in any manner relating to corporate powers," is a rather ambiguous phrase; we think the framers of the Constitution meant by that language to prohibit the *formations of corporations by special acts*. The subsequent language, "but incorporations must be formed under general laws," shows that was the meaning intended to be conveyed. Then, to use more appropriate language, the section would read in this way: 'legislature shall pass general laws for the formation of corporations; but no corporation (except corporation for municipal purposes) shall be created by special act.'

This, we think, is what the Constitution meant to express.

Is there not here positive implication that the legislature may create municipal corporations, much stronger than the negative implication in section eight, that they shall not? Besides, the power to create municipal corporations is usually exercised by state legislatures, and we ought to infer that the legislature of this state was inhibited from the exercise of such power, unless the Constitution is reasonably clear on the point.

But there is another view to take of this power. It may be that the convention intended by section eight to provide that all new towns and cities should be *organized* under general law. After they were once organized, if their circumstances, and necessities required more extensive powers, more restricted limitations upon the municipal officers than those conferred by the general law, the legislature might apply the remedy by special act. If such was the intention,

think the new charter was framed strictly in accordance with the idea. Virginia was a chartered city when the Constitution was adopted; it was already organized as a municipal government. It has never ceased to be such. The new charter is, in effect, but an amendment of the old one. The legislature could pass any special law in respect to municipal corporations (and of that we have no doubt), and there is no constitutional objection to this one. The act creating the new charter expressly authorizes the board of aldermen to provide for the levy, assessment, collection of a tax on all property, real and personal, in the city, which is subject to taxation for state and county purposes.

Admitting the city of Virginia to be a legally constituted corporation, it is contended the corporate authorities had no power to levy this particular tax on the proceeds of the mines.

The corporation is authorized to tax "all the property, real and personal, in the city, which is subject to taxation for state and county purposes."

But, say respondents, these ores attempted to be taxed are not *real estate* in the nature of things, and not *personal property*, because the statute declares they are not.

The fifth section of the revenue act defines real and personal estate, and winds up with this proviso: "That gold and silver bearing ores, quartz, or minerals from which gold and silver is extracted, when in the hands of the producer thereof, shall not mean, nor be taken to mean, nor be liable to be assessed under the term 'personal property,' as used in this section of this act, but is specially excepted therefrom and shall be listed, assessed, and taxed as hereinafter provided."

As we understand this proviso, it does not intend that ores which are the product of mines shall in no case be treated as personalty, but simply that such ores are not to be considered as included within the definition of real property, as used in that section, and that they are not to be listed or taxed under the general provisions in respect to personal property, but under other and special

Opinion of the Court—Beatty, J.

visions as to the product of mines. We think the products of mines are personal property subject to taxation for state and county purposes, and also to municipal taxation, under the law conferring the taxing power on the corporate authorities of Virginia. It is further objected, that this assessment was on property not in the city when the ordinance was passed for the assessment. The assessment was on property which was in the city after the passage of the law by the legislature.

All property within a city or state, except that which is *in transitu*, is liable to one annual taxation. The act of the legislature was sufficient authority for taxing all property within the city after the passage of that act. It made no difference when the ordinance was passed or the assessment made; if it were owned and held in the city at any time during the year after the law was passed, it was subject to taxation. The duty to pay a tax on the property arose [92] whilst the property was in the city. It could make no difference that it was removed from the city before the ordinance was passed prescribing the amount of tax to be paid, and the manner of assessing and collecting. There is no objection to making an act so far retroactive as to enforce the performance of an existing duty. We do not think the position that the ordinance is void, because it attempts to assess by legislation, is tenable.

The tenth article of the Constitution provides: "The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal, or possessory, except mines and mining claims, the proceeds of which alone shall be taxed."

The leading feature of this section is that the taxation shall be equal and uniform, and that the proceeds of the mines only shall be taxed. In other words, whilst the body of the mine remains untaxed, the ore taken out (for that is the primary proceeds of the mine), shall be subject to the same *ad valorem* taxation as other property. The mode of assessment prescribed by the legislature, and followed by the city ordinance, was doubtless intended to arrive at the

Opinion of the Court--Beatty, J.

the value of the ore, and tax it at that value. It is evident when the ore is taken out of the mine it is not worth what it will yield; for if ore be taken out which, by working process will only yield twenty dollars per ton, and it costs twenty dollars to haul it to a mill and have it worked, it is really worth nothing; hence it was very properly provided that in assessing ores, twenty dollars per ton should be taken from the actual yield of such ores, that being generally considered about the cost in the principal mining districts, of hauling ores to the mills and working them, at the time the law was passed. In addition to the deduction of twenty dollars per ton, there is a deduction of twenty-five per cent. from the remainder. Why this latter deduction was made, it would be hard to say, but this is not injurious to those who pay taxes on the proceeds of mines, and they have no right to complain. There ought to be some settled mode of ascertaining the value of ores or the proceeds of mines. The legislature is the body to prescribe that method. If there is nothing in the manner prescribed grossly unjust and in violation of that principle of equality prescribed in the Constitution, this court would not interfere with their action.

*Absolute equality in assessments is known to be [*93] impossible. We do not see anything in the mode prescribed by the legislature, and followed by the ordinance, which so far violates the principles prescribed in the Constitution as to authorize us to say the spirit of that instrument has been disregarded. The fixing of a valuation of five hundred dollars per ton on all ores, when the owners or managers of mines refuse to furnish the means of making a more correct assessment, is apparently a rather harsh rule, but there is no difficulty in avoiding such assessments. If a party willfully refuse information, it is but a just penalty or neglecting to perform a plain duty; in such case they can only blame themselves.

As the board are authorized to prescribe by ordinance the method of enforcing payment of these taxes, we see no reason why they may not add a penalty for not paying the taxes when demanded, which shall compensate the city or

Opinion of the Court—Beatty, J.

its attorney for the trouble and delay of enforcing the collection. The judgment is reversed. The court below will reinstate this cause on the calendar, overrule the demurrer, allow the defendant to answer if it chooses to do so, and proceed with the trial of the cause.

B. F. HASTINGS & CO. v. THE BURNING MOSCOW COMPANY.

[2 NEVADA, 93.]

¹ JUDGMENT FOR GOLD COIN VOID.

² JURISDICTION NOT CONFERRED BY CONSENT.—A defendant cannot, by consent, confer jurisdiction on a court to enter an illegal judgment, or a judgment beyond the jurisdiction of the court.

VOID JUDGMENTS.—An appellate court will set aside or modify void, as well as erroneous, judgments.

APPEAL from the District Court of the First Judicial District, Hon. RICHARD RISING presiding.

The facts are stated in the opinion.

Hillyer & Whitman and J. H. Hardy, for Appellants.

Crittenden & Sunderland, for Respondents.

[*95] *By the Court, BEATTY, J.:

This was a case in which judgment was rendered against defendant upon two promissory notes and an account.

The judgment is in terms for *gold coin* of the United States, and the only error complained of is that the judgment calls for coin, when under the rulings of this court, in *Burling v. Goodman*, the judgment should have been for money generally, and not for any particular kind of money.

The respondents make two answers to this assignment of error.

First. The judgment in this case was rendered in its present form by consent of appellants, and therefore they are estopped from appealing or complaining of any errors in the judgment.

(1) 1 Nev. 314; 1 Nev. 573; 1 Nev. 604; 1 Nev. 612. All these cases are overruled in 4 Nev. 462.

(2) 10 Nev. 413.

second. That the words "gold coin" are mere surplusage, and do not affect the validity of the judgment, or make different in effect from what it would be if these words were not employed.

On the first point, two things are to be considered. First, did the appellants consent to the rendition of judgment in the present form; second, if they did assent, does it preclude them from now objecting.

When the case was first before the court, it would seem the defendant (appellant) answered—filed some sort of petition, and made some motion in the case. Before the petition was disposed of, the following stipulation was filed:

"It is hereby consented and stipulated that the answer, petition, and motion on the part of defendant above named, are hereby withdrawn, and plaintiff allowed to take judgment according to the facts stated in their complaint."

Immediately after the filing of this stipulation in this case, judgment was entered, and in the judgment is this recital: "And by consent of the said attorneys in open court the answer, petition, and motion of defendant are withdrawn, and that judgment be rendered in favor of the plaintiff and against the defendant for the several sums mentioned in the complaint herein, with the interest thereon, claimed in said complaint."

It is not claimed that the stipulation authorizes a gold coin judgment, but it is said that the words "as claimed" in the foregoing quotation from the recitals of the judgment refer to the character of the judgment [*96] demanded for in the prayer of the complaint, and the mode of judgment in gold coin. We think the phrase "as claimed" refers simply to the *interest* claimed. It means, taken altogether, that plaintiff may take judgment for the sums claimed in the complaint, with interest at the *rates* named in the complaint. We think the recitals have reference to the amounts and rates of interest admitted by defendant, and not to the form of judgment.

That was fixed by law, and required no admissions from the defendant; and none, in our opinion, is expressed or intended to be expressed in this recital.

Opinion of the Court—Beatty, J.

We are satisfied if the defendants had in the most unequivocal manner consented to a judgment for gold coin, this court would still have been bound, on appeal, to reverse or modify the judgment. When a defendant consents to a judgment against himself he must be held to admit every possible fact consistent with the pleadings which would be necessary to support the judgment. It may also be held that by consent he waives all errors. But no defendant can by consent confer power or jurisdiction on a court to enter an illegal judgment or a judgment beyond the jurisdiction of the court. If a man is on trial for larceny in a court only having criminal jurisdiction, he can plead guilty; but he cannot at the same time authorize the court to enter judgment in damages against himself and in favor of the prosecutor for the value of the goods stolen. So a man, if sued for a debt in a court of civil jurisdiction, may come into a court and assent to a judgment for the money, but he could not authorize the court to add to the judgment an order that if the same was not paid in a certain time, defendant should be imprisoned until the debt was paid.

In this case, no judgment could be entered in gold coin without an express violation of law. We do not think defendant could authorize the court to violate law.

With regard to the second point, that the words "gold coin" are mere surplusage, void and without effect under the rulings of this court, we are compelled to differ with the counsel for respondent.

We do not hesitate to say that a tender of legal tender notes made and kept good would discharge a judgment for gold coin. But on the other hand, the sheriff must [*97] obey the orders of the *court of which he is an officer. If the court orders him to sell property for gold he must do so, or he is in contempt. The order, then, that the judgment must be made in gold, although void, is an order made by a court having jurisdiction of the defendant, and also of the action in which the order is made.

This order, although void, may operate unjustly to defendant, and we see no reason why this court may not correct it. This court has jurisdiction of the parties and of

Opinion of the Court—Beatty, J.

action, and we think should correct all illegal orders in the case, although perchance where the order is void the defendant might be able to maintain an action against a ministerial officer enforcing it. Appellate courts frequently set aside void judgments, as well as those which are merely erroneous and not void. (See *Gray v. App*, 4 Cal. 185; *Zander v. Coe*, 5 Cal. 230; *Kundolf v.heimer*, 2 Kernan, 593.) We have modified all judgments of this character heretofore before us, except in the case of *Mitchell & Hundley v. Bromberger*. That we read; because there were other seeming errors, and it did appear to us full justice would be done either party by simple modification. In this case we will pursue the same course as heretofore in similar cases.

The judgment in the court below must be so modified as to strike out all that part of it which relates to gold coin. The court below is ordered to make such modification. The appellant will recover its costs in this court.

Justice, C. J., did not participate in this decision.

CLARK, RESPONDENT, v. THE BURNING MOSCOW COMPANY, APPELLANT.

[2 NEVADA, 97.]

APPEAL from the First Judicial District, Hon. RICHARD G. presiding.

JUDGMENT IN GOLD COIN HELD ERRONEOUS.

C. Whitman, for Appellant.

Henden & Sunderland, for Respondent.

of the Court, BEATTY, J.:

[*98]

The only error complained of in this case is that the judgment is for gold coin. It only differs from the case of *Hastings & Co.* against the same defendant in this, that the judgment is founded on a trial and finding of facts,

Opinion of the Court—Beatty, J.

and not on the consent of defendant. Upon the authority of *B. F. Hastings & Co. v. the same defendant*, the judgment in this case is modified so as to strike out all that portion thereof which requires the same to be satisfied in gold coin. The court below is directed to make said modification.

The appellant will recover its costs in this court.

LEWIS, C. J., did not participate in this decision.

THE VIRGINIA & GOLD HILL WATER CO.,
RESPONDENT, v. THE BURNING MOSCOW MINING
CO., APPELLANT.

[2 NEVADA, 98.]

JOHN GILLIG & E. B. MOTT, RESPONDENTS, v. THE
BURNING MOSCOW MINING CO., APPELLANT.

[2 NEVADA, 99.]

JOHN GILLIG, RESPONDENT, v. THE BURNING MOS-
COW MINING CO., APPELLANT.

[2 NEVADA, 99.]

APPEAL from the First Judicial District Court, Hon. RICH-
ARD RISING presiding.

JUDGMENT IN GOLD COIN HELD ERRONEOUS.

B. C. Whitman, for Appellant.

Crittenden & Sunderland, for Respondent.

In each of these cases the following opinion was rendered.

By the Court, BEATTY, J.:

The judgment in this case will be modified on the author-
ity of *B. F. Hastings & Co. v. same defendant*, and *J. C.
Clark v. same defendant*.

The court below will modify the judgment by striking out
all that part thereof which requires the same to be paid or
satisfied in gold coin.

The appellant will recover its costs in this court.

LEWIS, C. J., did not participate in these decisions.

Points decided.

**TINGS & CO., RESPONDENTS, v. THE BURN-
MOSCOW G. & S. M. CO., APPELLANT.**

[2 NEVADA, 100.]

OTION UNDER AN ERRONEOUS JUDGMENT—HOW SET ASIDE.—The supreme court on appeal from a judgment might order an and sale made before appeal to be set aside, yet it is clear that t court after case reversed has concurrent jurisdiction to do hing. It is the proper practice after a judgment has been re- his court, to move in the court below, when these facts justify edings, to set aside a sale made on execution under an erro- ment.

JUDGMENT.—Sales under a *void judgment* are a nullity. But r a judgment merely erroneous are good, and pass the title erty sold.

the mere reversal of a judgment will not invalidate a sale made, there is no doubt courts may, under proper circum- then the rights of innocent parties are not thereby injuriously t aside such sales.

JUDGMENT PAYABLE IN GOLD COIN.—A judgment for so much e paid in gold coin is not void. The judgment is valid, but requiring it to be paid in coin is invalid. All parties are otice the invalidity of the latter clause.

SALE SHOULD BE SET ASIDE.—Sales made under erroneous will be set aside as far as can be done without injury to third When a judgment is reversed the parties should, as near as e restored to the condition they were in before error was com- third party purchasing at a judicial sale, and paying his ght, as a matter of policy, to be protected. When the judg- erely modified, and the plaintiff has been the purchaser of t may or may not be necessary or proper to set aside a previ-

rom the District Court of the First Judicial
n. **RICHARD RISING** presiding.

are stated in the opinion.

Williams and B. C. Whitman, for Appellants.

& Sunderland, for Respondents.

[*102] *By the Court, BEATTY, J.:

This cause comes before us under the following circumstances: In the year 1865, plaintiff obtained judgment against defendant for something over twenty-eight thousand dollars. The judgment directed the same to be [*103] made in gold coin. Execution issued, and *defendant's property was levied on and sold. The execution directed the amount to be paid in gold coin; the advertisement stated the sale would be for gold coin, and the sheriff, when the sale was made, announced it would be for gold. When the sale was made, one of the plaintiffs bid the amount of their judgment, including interest, costs, etc., for the property. There being no other bid, the sheriff gave a certificate of purchase to the plaintiffs, who bid the amount of the debt. Whilst the bid was by only one plaintiff, it is admitted the same was made for the benefit of all the plaintiffs. Subsequent to the sale under execution, defendant appealed from that part of the judgment which required the debt to be made in gold coin. Upon that appeal, this court directed the judgment to be so modified as to strike out all portions thereof directing the same to be paid or collected in gold coin.

After this modification was made, the defendant moved the court below to set aside the execution which had been issued directing the collecting of the judgment in gold coin, and also the sale made thereunder. The court refused to sustain this motion, and the defendant appeals to this court.

The appellant makes two points. First—That the district court had jurisdiction to set aside the sale made under an irregular judgment. Second—That when the plaintiff purchases under an irregular judgment, he must be deemed to be cognizant of that irregularity, and the execution and sale will be set aside. Upon the first point, respondents contend that the district court has no jurisdiction; that jurisdiction of this entire subject has been given by statute to this court. In support of this proposition, respondents refer to the 283d section of the practice act of 1861, and the 8th section of the act of 1864-5, in relation to courts of

Opinion of the Court—Beatty, J.

which are as follows: "Upon an appeal from a judgment or order, the appellate court may reverse, affirm, or modify the judgment or order appealed from, in the manner mentioned in the notice of appeal, and as to any of the parties; and may set aside, or confirm, or reverse, or all of the proceedings subsequent to or dependent upon such judgment or order; and may, if necessary, order a rehearing. When the judgment is reversed or modified, the appellate court may order complete restitution of all property and rights lost by the erroneous judgment or order; and *when [*104] the appeal was delayed to the appellate court that the appeal was delayed, it may add to the costs such damages as it may see fit to award."

This court may reverse, affirm, or modify the judgment or order appealed from, as to any or all of the parties, and may, if necessary, order a new trial, or the judgment to be changed. When the judgment or order appealed from is reversed or modified, this court may make, or direct the inferior court to make, complete restitution of the property and rights lost by the erroneous judgment or order.

The language of the 283d section of the act of 1861 is certainly broad enough to confer on this court power to set aside an execution under execution, made in any case which is reversible by this court. The other section (section eight of the act of 1864) we think does not by its terms embrace a proceeding of this kind. It was probably intended merely to cover those cases where specific, real or personal property was transferred from one party to the possession of another by the judgment or special order of the court, and those cases where there was a sale made under an execution or money judgment.

The section in the act of 1864-5 does or does not provide that in the act of 1861, may be somewhat doubtful.

It seems to me unnecessary to decide this point. Even if this court has power under the act of 1861 to make an order for an execution and sale made under an erroneous

Opinion of the Court—Beatty, J.

judgment, we are clearly of opinion the district court has a concurrent jurisdiction with this court to afford the like remedy. And we deem it the best and most regular practice to make such motion in the district court.

Generally, to sustain such motion, many facts must be shown which would not be shown by the transcript of the record used on appeal from the judgment.

It would be an absurd practice to burden the transcript sent to this court with extraneous matter, only to be used on motion to set aside executions, sales, etc., after reversal of the judgment.

The proper practice is, where a case has been reversed in this court, to move the court below to set [*105] aside any proceedings *intermediate the judgment and reversal, which have been prejudicial to the applicant.

How far the court below can or ought to afford relief, will depend on circumstances.

Sales made under executions issued upon void judgments are void and of no effect, except in so far as they may operate as a cloud on the title, and become the source of annoyance and litigation to the party whose property has been sold.

On the other hand, sales under executions regularly issued on judgments which are erroneous but not void, are valid sales, and pass the title of the property sold. The mere fact that the judgment is afterwards reversed will not invalidate the sale.

But whilst the reversal will not of itself invalidate the sale, there is no doubt but that courts may and will set aside sales made under erroneous judgments, when reason and justice require it should be done, and the rights of innocent parties will not be injuriously affected thereby.

This case presents some peculiarities not to be found in any of the cases to which the court is referred.

The judgment itself was not void, but a valid and subsisting judgment for so much money. To that judgment was added a clause requiring it to be made in gold coin. This court held in the case of *Milliken Brothers v. Sloat* that such

Opinion of the Court—Beatty, J.

clause is altogether invalid and of no effect. That a defendant, notwithstanding such clause, might still pay the judgment in legal tender notes before the same was reversed modified. We, as yet, see no reason to change our opinion in this respect.

If we are correct in that opinion, then this part of the judgment is something more than erroneous. It is absolutely void, and all persons would be bound to take notice at such a judgment could not be rendered by the court. If an execution follows a judgment which the court could not under any state of facts lawfully render, all parties could be bound to notice the illegality of the judgment, and could not, we think, be held as innocent purchasers under such execution, unless the result of a sale thereunder would be precisely the same as under an execution upon a regular judgment. Whether the advertisement and proclamation of a sheriff that he will only sell for gold coin, can operate injuriously to a defendant in execution, we will notice presently.

Whilst, as we have before stated, sales under erroneous judgments are clearly not void, it has been an established practice (and such practice was settled upon the most obvious principles of justice and common sense) after a reversal of a judgment to set aside sales and proceedings thereunder, so far as it can be done without injuriously affecting the rights of third parties.

After a judgment has been reversed, the court should, if possible, restore the parties to the same situation they occupied before the error was committed. If the plaintiff buys the property under an execution sale, made by virtue of an erroneous judgment, and still holds the property at the time the motion is made to set aside the sale, we can see no possible reason why it should not be done. If the purchase is made by a stranger, who has no reason to believe the judgment erroneous, both justice and the policy of the law require that the sale should be sustained.

The party having paid his money under a judicial sale could not be deprived of his property and turned over to a doubtful action against the plaintiff for the recovery back

the plaintiff being the bidder, and the judgment modified so as to reduce it to \$9,000, this is no ground for setting aside the sale; for the judgment still stands good for an amount sufficient to more than pay the property sold. But if it should be so modified as to reduce it to \$7,000, there would be good ground for setting aside the sale.

We think in this case there were two sufficient grounds for setting aside the sale. First, because the sale and execution were both irregular, in a matter of which all persons were bound to take notice. Second, because the plaintiffs being the purchasers and holders of the [*107] property sold, the setting aside of the sale restored the parties to the position they were in before the error or irregularity spoken of was committed.

It is said, however, by respondent, that no objection was made by this mode of sale, because any one might bid at the sale so many dollars and compelled the plaintiff afterwards, by proper proceedings, to take the legal tender notes. This proposition is not entirely clear in itself. There is no question that an individual may sell property either at private sale or auction only for gold or silver. There is no credit on such sales there is no *debt*, and the act of Congress in regard to legal tenders has no application.

Opinion of the Court—Beatty, J.

in execution. No person would bid as much for property, with the expectation of having a lawsuit to compel the sheriff to take paper money, as he would if he knew that such money would be received without question. We are of opinion the mode of sale was illegal, and injurious to the interests of defendant, and should have been set aside.

The order of the court refusing to set aside the execution and sale are reversed.

The court below will enter an order setting aside the execution and sale, and make all necessary orders to set aside, cancel and amend the proceedings under said execution and sale.

LEWIS, C. J., did not participate in this decision.

J. & A. R. SHOLES, RESPONDENTS, v. STEAD & HUNT,
APPELLANTS.

[2 NEVADA, 107.]

APPEAL from the First Judicial District, Hon. CALEB URBANK presiding.*

JUDGMENT IN GOLD COIN HELD ERRONEOUS.¹

*The facts are stated in the opinion. [*108]

Campbell & Seely, for Appellant.

Mitchell & Hundley, for Respondents.

By the Court, BEATTY, J. :

This is a judgment for six hundred and ninety-nine dollars and forty-six cents, besides one hundred and nine dollars and ninety-five cents costs, made payable in gold coin.

There are two assignments of error: one, that the judgment is for gold coin; the other, that the judgment, so far as it relates to costs, is erroneous, for the reason that no writ was filed within two days after the decision, as required by law.

(1) Overruled in 4 Nev. 462.

Opinion of the Court—Beatty, J.

This court has repeatedly held that a judgment for gold coin cannot be sustained.

In regard to the second point, these are the facts:

The cause was tried before the judge on the 8th day of December, 1865. At the conclusion of the argument, the judge made an order reciting the submission, argument, etc., and concluding as follows:

“Judgment ordered to be entered in accordance with the findings of court.”

On the following day (the 9th), findings which were in favor of plaintiff, were filed.

On the 11th, the cost bill was filed. The statute says: “The party in whose favor the judgment is rendered, and who claims his costs, shall deliver to the clerk of the court, within two days after the verdict or decision of the court, a memorandum of the items of his costs,” etc., etc. The only question is, what is the date of the “decision of the court?” Was it the 8th, when the first order was made, or the 9th, when the finding of facts was filed? We think, most decidedly, when the finding of facts was filed? The first order does not even intimate in whose favor the judgment would finally be. There might have been a finding of facts requiring the judgment to be for defendant. It is quite possible the judge may have stated how the findings would be, but the record shows nothing of the kind. [*109] In the absence of record evidence, this court cannot say the case was decided before the 9th.

The court below will so modify the judgment as to strike out all that part thereof which relates to gold coin. In other respects the judgment is affirmed. The appellants will recover their costs in this court.

LEWIS, C. J., did not participate in this decision.

Opinion of the Court—Beatty, J.

MAS McDONALD, RESPONDENT, v. PRESCOTT & CLARK, APPELLANTS.

[2 NEVADA, 109.]

JURISDICTION OF JUSTICES OF THE PEACE.—Nothing is presumed favor of the jurisdiction of a justice of the peace.

USE OF SUMMONS—HOW PROVED.—The mere recital in a transcript on a justice's docket that defendant was *duly served* is not sufficient. Before the transcript can be admitted to establish the rights of one holding under the judgment of a justice, the facts in regard to the service of summons must appear.

CONSTABLE'S CERTIFICATE OF SALE—MAY BE ATTACKED.—It may be proved a collateral proceeding that certain property was not actually sold by constable at a judicial sale, notwithstanding the constable's certificate of sale.

ANSWER OF AN OFFICER.—An answer in which an officer attempts to justify a seizure under execution, should not only set out the execution, but also the judgment on which the execution is founded, and show distinctly that defendant is an officer properly acting under such execution.

JUSTIFICATION OF, UNDER AN EXECUTION.—An officer may justify in some cases under an execution alone. But under other circumstances, when the controversy is with a purchaser whose title is only defective for want of a delivery, the officer must show the judgment as well as the execution.

APPEAL from the District Court of the Sixth Judicial District, Hon. E. F. DUNNE presiding.

Rae & Rhodes, for Appellants.

For the Court, BEATTY, J.:

[*110]

There was an action instituted to recover certain personal property. Plaintiff alleges that prior to and on the tenth of November, 1865, he was the owner of and in the possession of certain chattels; that on that day they were taken out of his possession by defendants.

Defendants for answer first deny that plaintiff was the owner of the goods sued for on the day stated, or on any day; secondly, defendants aver that the goods in controversy were the property of the Sheba company, and jus-

(1) 1 Nev. 82; 1 Nev. 188; 1 Nev. 327; 5 Nev. 90.

(2) 10 Nev. 370.

Opinion of the Court—Beatty, J.

tified the taking under an execution sued out from the district court of Humboldt county against said company; thirdly, defendants say that if plaintiff ever had any possession of the chattels in dispute, it was obtained by fraud and collusion. Then follow certain averments setting out the particulars of the alleged fraud, showing that plaintiff's only claim to the property was under a sale, or a pretended sale, made by a constable, in pursuance of certain alleged fraudulent schemes; and winding up with an allegation that the property in dispute was not sold by the constable, but that he made a false and fraudulent certificate of purchase to plaintiff, including this property, and that the property was never delivered to plaintiff, but remained in possession of the Sheba company.

The plaintiff moved to strike out all that part of the answer which relates to the alleged fraudulent doings of plaintiff, the constable, etc. This motion was sustained, and the parties then went to trial.

The plaintiff, to prove his right to the property, [*111] introduced a judgment entered by a justice of the peace in Star township, in favor of *Edward Jones v. Sheba Company*; the execution issued thereon; the return of the officers on the execution; and the officer's certificate of sale, showing a sale to himself of the property now in dispute.

The defendants objected to this testimony, on the ground that there was nothing in the transcript from the justice's docket showing that the Sheba company had ever been served with summons, or that the justice had jurisdiction of the case. This objection we think well taken.

There is a recital in the transcript from the justice's docket to this effect: "Summons issued, returnable August 17, A. D. 1865, at 11½ o'clock A. M. August 15, 1865." "Summons in the above case duly served, returned, and filed, August 17, 1865, 12½ o'clock A. M."

Nothing is presumed in favor of the jurisdiction of courts of limited jurisdiction. The recital that the summons was duly served, without stating the facts as to how, when, or where it was served, is not sufficient. It is merely the

Opinion of the Court—Beatty, J.

ion of the justice that the service was sufficient. Poss-
r a court of superior jurisdiction might, if the facts
before it, hold otherwise.

ere was no appearance of the Sheba company. Default
taken against that company.

e cannot, under such circumstances, presume the jus-
had jurisdiction. (*Lowe v. Alexander*, 15 Cal. 296.)

re summons and return thereon should have been pro-
d with the transcript, to show jurisdiction. It was
r to admit the evidence as offered.

sfendants also offered to show that the constable did
sell the property in dispute at the constable's sale,
ugh the certificate of sale stated that he had sold this
erty to plaintiff.

re court ruled this evidence out, on the ground that the
ndants could not attack the constable's sale collaterally.
s we understand the offer, it was to prove the constable
r did offer this particular property for sale. This was
imate evidence. Supposing the constable's sale to have
a regular one on a valid judgment, plaintiff only got
to the property really sold to him by the
er. The constable's certificate could *not make [*112]
le to plaintiff for property that he never sold

We know of no rule of law which would estop a party
inquiring whether such certificate contains the truth
falsehood. It was error to refuse to admit this evi-
e. In this case it was a pertinent inquiry as to whether
property really was sold by the constable, or whether it
through fraud, ignorance, or mistake inserted in the
ficate as having been sold, when in reality it never was.
e are inclined to the opinion that the court erred in
ing out a part of the defendants' answer. The answer,
ever, is rather defective, and we would suggest an
adment before this case is re-tried. The answer would
been more perfect if, in addition to the execution, it
alleged a good and subsisting judgment against the
sa company. It fails, also, to show that defendants,
ither of them, was an officer.

a execution, regular on its face, will sometimes justify

Opinion of the Court—Beatty, J.

the officer; but when an officer levies on the property which has been sold by the defendant in execution, in such a way as to make the sale good as between him and his vendee, but not good against creditors, (as, for instance, where there has been a *bona fide* sale, but no delivery) the officer must show not only an execution, but a judgment.

The judgment is reversed, and remanded for further proceedings, with leave to defendants, if they desire it, to amend their answer.

DECISIONS
OF
THE SUPREME COURT
OF THE
STATE OF NEVADA.

JULY TERM, 1866.

MEARA, RESPONDENT, v. THE NORTH AMERICAN MINING CO., APPELLANT.

[2 NEVADA, 112.]

MEASURE OF DAMAGES.—Ordinarily the measure of damages is the value of the article when converted, together with interest, subject however to some qualifications.

COMPEL DELIVERY OF MINING STOCK—MEASURE OF DAMAGES.—The proceeding is in equity to compel the delivery of stock, and if defendant is unable to deliver it, the alternative decree should be for the value of the stock at the time of the trial.

EQUITY—DUTY OF.—Courts of equity should allow a [*113] reasonable delay and indulgence to enable the parties to establish their rights, instead of depriving parties of their substantial rights on account of technical error or omission.

WRITING NAME WRONG.—A party executing a deed cannot avoid it if he spells his name wrong in signing it.

EQUITABLE DEED AND RIGHTS OF GRANTEE.—When one conveys an interest in a mining company to trustees, and afterwards conveys the same with covenants of warranty to another party, the last takes an equity, and is entitled to the shares to be issued in lieu of the first.

COMPULSION OF MINING STOCK.—When trustees of a mining company refuse to deliver the stock to the party equitably entitled, the court will not compel them to do so, but will issue to another, especially when that other can only show his right by establishing his own fraud.

(1) See 8 Nev. 345.

(2) See 9 Nev. 312.

Opinion of the Court—Beatty, J.

APPEAL from the First Judicial District, Storey County,
Hon. RICHARD S. MESICK presiding.

The facts are stated in the opinion.

Hillyer & Whitman, for Appellants.

Taylor & Campbell and Isaac Atwater, for Respondents.

[*114] *By the Court, BEATTY, J.:

This was a proceeding in equity to compel the transfer of certain shares of stock to the plaintiff; and if said stock could not be transferred, then asking a decree for compensation and damages, for the failure to transfer the stock.

The plaintiff alleges that he had held five hundred and fifty feet of ground in the North American Mining Co. claim. That he first sold *and assigned [*115] three hundred and fifty-two and a half feet of it to individuals, and then conveyed the remainder, one hundred and ninety-seven and a half feet to the trustees of a corporation formed to work said claim. That in consideration of said conveyance he was to have had transferred to him one hundred and ninety-seven and a half shares of stock. But before the deed to the trustees was recorded, he admits having sold ten feet more of the ground. So he only claims that the trustees should transfer to him one hundred and eighty-seven and a half shares of stock.

The answer alleges that the plaintiff, before the conveyance to the trustees, had conveyed to others three hundred and seventy-seven and a half feet, (say twenty-five feet more than plaintiff admits) and after the conveyance to the trustees, and before they were ready to issue the stock, he had conveyed his interest in one hundred and eighty-two and a half feet to others. This would make more by ten feet than plaintiff ever claimed in the company.

On the trial of the case, the plaintiff proved that he had made a demand for his stock in the latter part of June, 1863; and proved that in the year 1864 this stock was at one time worth two hundred dollars per share, and rested.

The defendant proved conveyances from the plaintiff to an amount of three hundred and eighty-seven and a half t, which were admitted without objection. The defendant then offered in evidence three other deeds, or rather copies of deeds, from the plaintiff to other persons, for other portions of the same mining ground. These instruments were rejected, and this rejection forms the principal ground of complaint on the part of appellant. The facts in relation to each one of these instruments will be more particularly noticed when we come to consider the assignment of errors.

There are numerous errors assigned by appellants, only two of which it will be necessary to notice, as a determination of these points will probably settle the entire controversy. The first assignment of error is that the court adopted an erroneous rule in estimating damages.

The plaintiff, if entitled to stock at all, became so entitled about the last of June, 1863.

At that time he demanded his stock, and it was refused. He offered no proof of the value of the stock at the day he demanded it, nor at the day of trial. He [*116] only offered proof of the highest market value of the stock between the 10th day of June, 1863, and the day of trial. It was proved that, at one time in April, 1864, the stock was worth two hundred dollars per share. And the court gave judgment in damages for the value of the stock at that price. This was clearly an erroneous basis for the estimation of damages.

In the action of trover, it has been sometimes held that the measure of damages is the highest price of the article converted between the day of conversion and the day of trial. In other cases, between the conversion and the commencement of action.

Whilst it cannot be denied that there are some respectable authorities containing both these propositions, we cannot think they are founded either in reason or justice. We think such propositions contrary to some of the best settled principles of the common law.

The theory of all actions for damages is, that the plaintiff

sues for those damages which he has already sustained. He could not say in his complaint that he had already sustained certain damage, and expected to sustain other damage before the suit was tried. Nor could he say he had sustained certain damages by the conversion of his property, and subsequently other damage arising from the fact that the particular kind of property converted had risen in value since the conversion.

The action is for converting the property; the utmost limit of damages would be the amount of money it would have taken to replace the property converted. But as the plaintiff has to wait for that money until he recovers it in his action, doubtless it would be just and proper to allow interest from the time of conversion. That the property afterwards rises or falls in value cannot be the subject of legitimate inquiry. If the plaintiff were allowed to show after the conversion the property rose in value, and the conversion deprived him of this profit, it would be proper to allow defendant, in rebuttal, to show that, if the property had not been converted, plaintiff would have sold, and that not he, but another, would have made the profit. Why not allow the defendant to show that if he had not converted the property, plaintiff would have exchanged it for other property, which afterwards became worthless, and thereby defeat all claim for damages? Such propositions [*117] would not, of *course, be listened to with respect by any court, yet we think they are scarcely less in conflict with the established and settled doctrines of the law than the proposition to allow the plaintiff to prove the temporary speculative value which an article may have had months or years after conversion. We think the true rule of damages in a case of trover is the value of the article when converted, with interest from that time to the time of trial, with perhaps this modification: when there has been an actual conversion at one time, which, however, is not clearly brought home to the knowledge of the plaintiff, and he subsequently makes a demand for the article, and is refused, he may prove value at the time of the demand and refusal. For although there may have been an actual prior

Opinion of the Court—Beatty, J.

conversion, he is not properly bound by it until he knows it has been converted. As he could not know the actual time of conversion, he ought, as against a wrongdoer, to be allowed to prove the value at the time he first learned he could not obtain his property on demand.

And we are satisfied that some of the ablest courts of the United States have uniformly held that the measure of damages is to be fixed by the value of the property at the time of conversion. The decisions of the courts of Massachusetts and Kentucky have, we think, uniformly adopted this rule.

On the other hand, those courts which have held that the highest price of an article between the time of conversion and trial, or commencement of the action, is the proper criterion of damages, are not uniform or consistent in their rulings. But, whatever may be the rule in a case of trover, there could be no room for doubt in such a proceeding as this.

The plaintiff asks for the stock itself, not for damages. If the court finds he is entitled to the stock, but defendant cannot transfer the stock, because it has none to transfer, then there can certainly be but one rule or measure of damages: that is to decree as much as would buy the same amount of stock at the time the decree is rendered, for the money comes in lieu of the stock—stock which should be transferred at or after the decree, and it is wholly immaterial what that stock may have been worth at any former period.

The other assignment of error which we shall notice is as to the rejection of certain deeds offered in evidence by defendant and *rejected by the court. The first [*118] paper offered was a certified copy of a deed from John O'Mara to Pettybridge, dated September, 1860—twenty-five feet of ground in the North American claim. Before offering the certified copy, defendant introduced the following preliminary testimony. L. Herman testified as follows: "I am secretary of the defendant; the company has not the custody or control of a deed from plaintiff to P. Pettybridge for any portion of ground of which defendant is in posses-

Opinion of the Court—Beatty, J.

sion. It has not the custody nor control of a deed for any such ground from plaintiff to W. Van Vliet, or W. B. Harris. No such papers are in possession of the company."

B. C. Whitman testified: "I have made search among the papers shown me by L. Hermann, as belonging to the defendant, and cannot find either of the deeds by him referred to."

W. G. Orrick says: "I made search among the papers of J. R. Plunkett, deceased, former secretary of defendant, for the papers referred to, and could not find them." On cross-examination he said: "I never had search made at the company's office, and no authority to make the search I did."

Robert Apple testified: "I know of a deed from plaintiff to P. Pettybridge for twenty-five feet of North American ground. I bought of Pettybridge, and would not complete the transaction, because the deed was not acknowledged. So I went with the plaintiff to the office of Samuel Arnold, in Gold Hill, and the plaintiff there acknowledged the deed before him. Arnold was a notary public; he attached his certificate, and I paid for it after it was acknowledged. Pettybridge made transfer on the same paper to me, and acknowledged it before the same notary. This occurred some time in the spring of 1863. I have not the deed now. I gave it to defendant."

Then a copy of the deed, duly certified by the recorder of Storey county to be a copy taken from his records, which also contained the notary's certificate, the certificate of the former recorder of recordation of the instrument, etc., etc., all in due form, was offered in evidence. The plaintiff objected to its introduction, because there was no proof of the existence of the original, nor of its loss or destruction, and because it did not purport to be the deed of the plaintiff.

[*119] *That there was such an instrument, was positively proved by Robert Apple. That the instrument was lost or destroyed, it is true, was not proven. Nor is any such proof necessary in regard to recorded instruments. All the statute requires as preliminary to the intro-

Opinion of the Court—Beatty, J.

on of a certified copy of a recorded deed is to show that it is lost or that the party wishing to use it has it not power. Here L. Hermann swears the company had the custody or control of the paper. This is some proof, only, of the only material fact to be established. But very unsatisfactory. Witness does not state how he obtained his knowledge that the company had not the custody of the paper. He does not say he was the custodian of the papers of the company. He does not show that he made search for the original. Indeed, he shows no circumstance which would entitle him to make the positive assertion he does make.

ordinarily, we should have thought very little testimony on this head was necessary, because it was not to be supposed that the company would be custodian of a deed from the time it was made to Pettybridge. Naturally we would suppose that the deed to be in the possession of the grantee; and, perhaps, under ordinary circumstances, if the secretary had simply sworn that he was the custodian of the company's papers, and did not know of the whereabouts of the deed—that it had not been in the possession of the company that he knew of, his testimony would have been sufficient. But in this case, Mr. Apple proves that he delivered the deed to the company, and it having been once in possession of the company, they should have produced the deed, shown that it subsequently passed out of their possession, or that they made an honest attempt to find it. If the evidence is as reported, defendant does not show that any *bona fide* search was made for it. Mr. Whitman searched the papers delivered to him by the secretary, but the secretary does not show he handed him all the papers. The proof was very weak; yet we hardly think the deed should have been so easily rejected even on this proof.

It was a matter addressed to the discretion of the judge. The secretary of a company is usually the custodian of the papers of the company. If the judge was not fully satisfied in this case that the secretary was the custodian of all the papers of the company, it would certainly have been better to inquire on that point *than reject a [*120]

Opinion of the Court—Beatty, J.

paper which was so essential to the defense. It appears, too, that the secretary who formerly had charge of the papers of the company was dead, and that the present secretary came into office after this deed was delivered to the company. That being the case, he may not have been aware that the company ever had the deed, and therefore felt the less necessity for looking for it. It would most certainly have been more satisfactory if proper inquiries had been made on this subject; and if proper search had not already been made, time might have been given to the secretary to make such search. This could have been done without inconvenience or delay, as there was no jury in the case. The deed was a recorded instrument; the public usually look to the records without inquiring about the original. There is scarcely a probability that any material error could have occurred in the copying. Here there was proof outside the record that the plaintiff did execute the deed. There was no real doubt as to plaintiff having executed such a deed. We can hardly conceive that a court of equity is performing its legitimate duty when under such circumstances it rejects a deed which is essential to the defense, and gives judgment against a defendant for a large sum of money, not because the presiding judge is convinced defendant ought to pay it, but because defendant has committed some technical error in making its defense.

If a complainant goes to trial in a court of equity and fails to make out a case justifying a decree in his favor, yet showing that he probably has an equity which he might make out at another time, his bill is dismissed without prejudice, thus allowing time to begin anew, and not cutting him off from all chance of obtaining his just rights. So if a defendant evidently and beyond all reasonable doubts has a good defense, the court should grant some delay and give some indulgence to enable him to make out that defense according to the prescribed forms of law. Courts of equity are instituted to do justice, and not to play at games of chance or skill. Again, in this case, the objection raised to the admission of the deed was, that the

Opinion of the Court—Beatty, J.

of the deed was not properly shown. Nothing of the kind had to be shown. Had the point been properly made the defendant had failed to show the original was not in power—perhaps a further examination of Hermann would have removed the difficulty.

I do not think the court made a wise and prudent use of its discretionary powers in rejecting the deed without further inquiry.

Another objection to this deed we can hardly treat seriously. The signature to the deed is spelled *O'Mara*. The plaintiff in his complaint spells his name *O'Meara*; the deed in the certificate spells it *O'Mera*. Here we have two spellings of the name. But any English scholar knows that *a*, *ea* and *e* have in many words the same sound. Naturally it is so in proper names and in many foreign names.

Both *e* and *ea* frequently have the same sound as *a* in English and many other English words. Then even according to the strictest rules of pleading these names would be considered and treated as the same. They are *idem sonans*. Now are we to know what is the proper spelling of the plaintiff's name? It is proved that he acknowledged the deed as *John O'Mara* as his signature. He acknowledged this particular deed as his deed. Can he avoid his deed by getting a lawyer to spell his name wrong in a complaint filed? If one of these spellings is right and the other wrong, from all the proof before this court it must be concluded that *O'Mara* was right, for that was the signature the plaintiff acknowledged, and *O'Meara* is wrong, for we have no other proof of the correctness of this spelling than we find it in the complaint. We think it is hardly to be presumed that a lawyer always spells his client's name correctly, especially when his client spells it differently.

It is in reality a matter of no importance which of the two names is right, or whether either of them spelled correctly. A party can neither avoid his deed by omitting a letter of his name when he attaches his signature to it, nor by employing a lawyer to add an extra letter to the spelling when he files a complaint. The question here was, did the plaintiff—the man prosecuting this suit—make the deed valid. Dec.—41

Opinion of the Court—Beatty, J.

offered in evidence. The proof was positive that he did acknowledge having made it, and that was sufficient reason for admitting it, without any inquiry as to the proper spelling of his name.

The next paper offered in evidence was a certified copy of a deed from John O'Meara to W. B. Harris, dated June 11, 1863. This was objected to as incompetent and irrelevant testimony; only on the ground that it was made after plaintiff had conveyed all his interest in the mining [*122] ground to the trustees of the defendant. The *deed is for an interest of one hundred and thirty-seven and a half feet in the North American claim; it is very full and purports to carry, not only the one hundred and thirty-seven and a half feet, but any and all equities plaintiff may have had in that many feet in the North American company's claim. It also contains a full warrantee deed that said one hundred and thirty-seven and a half feet are clear and free from all incumbrances, sales or mortgages made by plaintiff.

At the time this deed was made, plaintiff had conveyed the legal title to all his feet or undivided interest in the mine to the trustees of the corporation. But he certainly had an equity in those feet. He was entitled to one hundred and thirty-seven and a half shares of stock in lieu of the feet. There can be no doubt but it was the intention of the grantor to convey that equity. The language used sufficiently expresses that intention, although the words shares and stock do not appear in the deed.

But where the intention of a party is sufficiently apparent, a court of equity will carry out that intention, even if the most appropriate language is not used to express what was meant. The proof shows here that plaintiff had just one hundred and thirty-seven and a half feet of ground undisposed of when he deeded to the trustees of the corporation, and that he was entitled to just one hundred and thirty-seven and a half shares of stock in lieu of those one hundred and thirty-seven and a half feet. What did he mean by making this deed? Either one of two things: to deed and transfer to Harris his right to demand the one hundred and thirty-seven and a half shares, or else to swindle Har-

Opinion of Lewis, C. J., concurring.

by deeding to him ground or feet which he had already ded to others. In either event Harris was entitled to stock. A mere verbal order to the trustees to deliver ificates of the stock to Harris would have been sufficient. If this deed was intended as a written transfer of leara's right to the stock, as we think it clearly was, it is ainly sufficient. If, on the contrary, the deed was inled as a mere fraud, and a trick to get Harris' money nothing, a court of equity would not hesitate to give rris the stock, in lieu of the mining ground which by terms of the deed he was to have.

f the company issued the stock to Harris, who s equitably *entitled to it, the court would not [*123] nt its aid to the plaintiff to recover the same ck from the company. A party will not be allowed in a rt of equity to establish a claim by showing his own d and deceit.

We cannot, of course, know what might be brought out a future trial of this case, and can only reverse the judg- nt and send it back for further hearing; but unless some w facts can be made to appear, different from those dis- sed in this transcript, we can but express the hope that intiff will dismiss the case, and not again place himself so unenviable a position as the evidence in this record s placed him.

Judgment reversed, and cause remanded for further pro- edings.

By LEWIS, C. J., concurring:

I concur in the judgment of reversal in this case, but as the rule of damage adopted, I do not wish to be under- od as sanctioning it as a general rule. In cases of this aracter it is undoubtedly correct. I am not, however, epared to say that in some other form of action the high- t value of the stock between the time of conversion and at of trial would not be the proper measure of damage.

I am also of opinion that the defendant did not establish roper foundation for the admission of a copy of the deed m the plaintiff to Pettybridge, and therefore that the

Opinion of Lewis, C. J., on response to petition.

court below ruled correctly in excluding it. But as to the exclusion of the deed from O'Meara to Harris, I fully concur in the views expressed by Justice Beatty.

BROSNAN, J., did not participate in this decision.

RESPONSE TO PETITION FOR REHEARING.

[*124] *By the Court, LEWIS, C. J.:

In their petition for rehearing in this case, counsel for respondent claim that this court erred in the rule of damage adopted by it in its former opinion. I was not at that time prepared to sanction the general rule as stated by Justice Beatty; but after a thorough examination of the authorities, I am convinced that with some qualifications it is the correct rule in trover.

It was stated in that opinion that the general rule of damage in an action for the unlawful conversion of personal property, is the value of the property at the time of conversion, with legal interest thereon from the time of such conversion.

It is manifest, however, that this rule would not in all cases afford the owner such indemnity as in justice he might be entitled to; and in some cases under it the wrongdoer might make a profit by his unlawful act, which I think is repugnant to the general spirit of the law. The first object of the law in actions for wrongful conversion or detention for personal property should be to place the owner in as favorable condition as if he had not been deprived of his property, or to give him ample and full indemnity for its loss; and it should be no less an object to deprive the wrongdoer of any profit which he may have derived, or which he has it in his power to realize from his own wrong.

The rule, therefore, which seems to me most consonant to justice, and most in harmony with the spirit of the law, is, that the owner of the property wrongfully converted or detained shall receive as a measure of damage the market value of the article at the time of the conversion, together

Opinion of Lewis, C. J., on response to petition.

h any damage which he is proven to have sustained from loss of its possession. It is clear that the addition of legal interest to the market value of the *prop- [*125] will not in all cases compensate the owner for loss. If it be satisfactorily established that the loss which the owner has sustained by the wrongful conversion of his property amounts to more than its value at the time of conversion, with legal interest thereon, why should he be confined to the recovery of the latter sum? It is not a compensation for the loss which he has suffered, and I see no good reason why the law in such case should sanction injustice when it can afford complete relief. There are many cases where it may be established beyond a doubt, that if the owner had not been dispossessed of his property he would have realized more money from it than its value at the time of conversion, with legal interest.

The case of a contract to deliver the property to a solvent purchaser at a price exceeding that it bore at the time of wrongful conversion, clearly shows the injustice of confining the owner's recovery to the price of the article at the time of conversion, with interest thereon. Under such circumstances it would be pretty clearly established, that if he had not been dispossessed the owner would have realized the enhanced value of the article, which might far exceed the value at the time he was deprived of the possession, with legal interest. Of course it would not be sufficient to show that the owner *might* have taken advantage of an appreciation in the market value. Facts must be shown sufficient to satisfy the jury that he *would* have done so. But it may be said, if the owner is permitted to show that he would have realized more than the market value of the article at the time of conversion if he had not been deprived of the possession, the wrongdoer should on the other hand, as a defense, be permitted to show that if the owner had continued in the possession he would have lost his property entirely, or that it had so depreciated in value that he would never have realized even the value it bore at the time of its conversion. This cannot be allowed, because, as we stated before, the law will not permit the wrongdoer to make a profit out of his own wrong.

Opinion of Lewis, C. J., on response to petition.

After a thorough and able examination of this question, Justice Duer, in delivering the opinion of the court in the case of *Suydam v. Jenkins* (3 Sandf. 614), lays down what seems to me to be the correct rule, in the following manner:

"We think it follows, from the observations that [*126] have been made, *and the illustrations that have been given, that the principles which we have stated as those which ought to determine the amount of the judgment will be carried into effect in all cases by adding to the value of the property when the right of action accrued, such damages as shall cover not only every additional loss which the owner has sustained, but every increase of value the wrongdoer has obtained, or has it in his power to obtain. And we are satisfied, after much consideration, that there is no other mode of computation by which, as a universal and invariable rule, the same result can be attained."

This, in my opinion, is the correct rule of damages in all cases arising out of the wrongful conversion of personal property, where the relief sought is damages for such conversion.

The case referred to in 3 Sanford clearly shows also that the highest market value of the property between the time of conversion and the time of trial is not the correct measure of damage, unless it is fully shown that the owner would have realized that value had he not been deprived of the possession by the wrongdoer.

When, however, the action is in equity to compel the redelivery or transfer of stock, as in this case, the rule is different, and it seems to us there can be no doubt as to what the judgment should be. The principal relief asked is a delivery of the stock, and not damages for its conversion, although that is sought as alternative relief. If it appears upon the trial that it is not in the power of the defendant to deliver the stock, the measure of damage most assuredly should be the value of the stock at the time of trial. When the relief sought by the plaintiff is the delivery of the stock, is he to be placed in a better condition by the inability of the defendant to deliver it, than he would be if the defendant had it in his power to replace or trans-

Opinion of Lewis, C. J., on response to petition.

as prayed for by the plaintiff? In a case of this kind
 ms to us the judgment should be for the stock, and in
 the defendant failed to deliver it, then that plaintiff
 er its market value at the time of trial. The value of
 tock in such case is given in lieu of the stock itself.
 is certainly the rule in chancery, and we can see no
 ble means of avoiding it. The plaintiff could un-
 tedly have brought his action for damages, and in such
 the judgment would have been for the value
 e stock, with *any additional loss which he [*127]
 l show he had sustained by reason of the un-
 al conversion under the rule as above stated.

e has not, however, chosen to bring his action for dam-
 , but for the stock itself. Why should he then be per-
 ed to recover more than the stock, or its value at the
 it would have been delivered to him under the judg-
 t, if the defendant had it in his power to deliver it? It
 rfectly clear that the plaintiff must be entitled to some
 f beyond the delivery of the stock, if he is entitled to
 oney judgment for more than its value at the time of
 . But here the plaintiff prays for a delivery of the
 k, and as it was shown that the defendant did not have
 his possession, a money judgment for its highest market
 e after conversion is rendered against the defendant.
 ur opinion, the plaintiff was only entitled to a judgment
 a delivery of the stock, or in case delivery could not be
 , then its value at the time of the trial.

pon the ruling of the court in rejecting the certified
 y of the deed from O'Meara to Pettybridge, it is un-
 ssary to say anything. In my own opinion, the court
 d correctly in rejecting it, but no such question need
 e up upon the new trial of this case, for the reasons that
 preliminary proof which the defendant failed to produce
 re can readily be supplied at the new trial. Hence it
 question of no importance now, and a further con-
 ration of it is unnecessary.

he question raised upon the deed from the plaintiff to
 ris is fully discussed in the original opinion in this case.
 upon further consideration we are fully satisfied that

Points decided.

we held correctly. Whatever might be the effect of that deed, at law, it cannot be doubted for a moment that Harris could in a court of equity have compelled the defendant to deliver to him the stock representing the number of feet for which he had paid a valuable consideration, if it had not already delivered it to the plaintiff.

He had paid O'Meara for his interest in the North American mine. Will it be said, then, that a court of equity would not compel the plaintiff to deliver the stock which represented that interest to the purchaser? If O'Meara himself could be made to transfer the stock, the company which held it for him could certainly be compelled to do so.

We conclude, therefore, that it made no difference [*128] ence that it was not *shown that the stock had been delivered to Harris. It was sufficient for the defendant to show that it was liable and equitably bound to deliver it to him if he called for it, which it did do by the introduction of the plaintiff's deed to Harris.

We see no good reason for granting the rehearing; it is, therefore, denied.

BROSNAN, J., did not participate in this decision.

JOHN HOWARD, RESPONDENT, v. JOHN RICHARDS
AND ELIAS RICHARDS, APPELLANTS.

[2 NEVADA, 128.]

PLEADINGS—NONPAYMENT OF PROMISSORY NOTE.—A complaint setting out a note in full, and alleging the execution and delivery to, and ownership thereof by plaintiff, and that there is "due, owing, and payable" a certain sum, is a good complaint, although it does not in direct terms allege the nonpayment of the note.

¹ **COST BILL—APPEAL FROM JUDGMENT.**—The cost bill is no part of the judgment roll, and where there is no statement or bill of exceptions, we cannot pass on its correctness. On a mere appeal from a judgment we cannot review any error which might occur in refusing to sustain a motion made, after the appeal was perfected, to strike out the cost bill.

MISTAKES IN JUDGMENT—WHEN CORRECTED.—The mistake in the calculation of the amount for which judgment should have been rendered, should have been corrected by motion in the lower court.

(1) See 5 Nev. 251, 252.

Opinion of the Court—Lewis, C. J.

APPEAL from the District Court of the Eighth [*129]
Civil District, Hon. D. VIRGIN presiding.

The facts of this case are fully stated in the opinion.

H. Brumfield, for Appellants.

Atwater, for Respondent.

By the Court, LEWIS, C. J.: [*130]

The complaint in this action was in the following form:
John Howard, the plaintiff, complains of the defendants,
John Richards and Elias Richards, and for his cause of
action alleges that heretofore, to wit, on the nineteenth
day of February, A. D. 1864, the said defendants made, exe-
cuted, and delivered to the plaintiff their promissory notes
bearing date, of which the following are copies:

NEVADA TERRITORY, DOUGLAS COUNTY, }
February 19th, 1864. }

\$1000. On the first day of November next, for value
received, we promise to pay John Howard, or bearer,
the sum of one thousand dollars in good lawful [*131]
money of the United States of America.

“JOHN RICHARDS,
“ELIAS RICHARDS.”

“DOUGLAS COUNTY, February 19th, 1864.

\$1000. On the first day of May, A. D. 1865, for value
received, we promise to pay John Howard, or bearer, the
sum of one thousand dollars in good and lawful money of
the United States of America.

“JOHN RICHARDS,
“ELIAS RICHARDS.

“That said notes are long past due, that the plaintiff is
the legal holder and owner thereof, and that there is
nothing owing, and payable thereon from the defendants
to his plaintiff the sum of two thousand three hundred and
thirty-three dollars, for which sum the plaintiff prays

Opinion of the Court—Lewis, C. J.

judgment against said defendants, together with the costs of this action.”

To this complaint the defendants interpose a general demurrer, which was overruled by the court below, and upon the refusal of the defendant to answer, judgment was rendered in favor of plaintiff, in accordance with the prayer of his complaint, from which the defendants appeal.

It is argued here that the complaint is defective in not alleging the nonpayment of the notes, and for that reason the demurrer should have been sustained.

In our judgment the complaint is sufficient, though it would have been a much better pleading had it contained a direct and positive allegation of nonpayment. By the rules of pleading which have grown up under the code of procedure or practice act, all of the mere formal parts of pleadings which the common law required are dispensed with, and nothing is now required but a concise statement of the facts necessary to be proven to entitle the party, plaintiff or defendant, to the relief claimed. A complaint is sufficient if it contains a clear, positive, and direct statement of facts which, if proven, will entitle the plaintiff to the relief which he seeks.

This complaint certainly contains allegations of all the principal facts which it would be necessary to establish [*132] to authorize a *recovery—the execution and delivery of the notes, the maturity, the ownership of the plaintiff, and that at the time of bringing the action there was “due, owing, and payable” thereon a certain sum of money. The establishment of these facts would have entitled the plaintiff to judgment for the amount due on the notes. But it is said in the statement that there is a certain sum “due, owing, and payable” on them is not a sufficient allegation of nonpayment.

It is provided by section 70 of the practice act, that “in the construction of a pleading, for the purpose of determining its effect, its allegations shall be literally construed, with a view to substantial justice between the parties;” and section 37 declares that “all forms of pleadings in civil actions, and the rules by which the sufficiency of the plead-

Opinion of the Court—Lewis, C. J.

shall be determined, shall be those prescribed by this " When tested by the rule that pleadings must be generally construed, with a view to substantial justice between the parties, we could scarcely say, in a case of this kind, where the notes are fully set out, and the complaint shows the execution, delivery, maturity, and ownership of them, that the statement that there is a certain sum "due, owing, and payable" thereon is not a sufficient allegation of nonpayment. Indeed, the law presumes the nonpayment from the fact that they remain in the possession of the plaintiff. It is somewhat like the presumption of law that bills and notes are founded upon a sufficient consideration, and hence it is entirely unnecessary to allege a consideration in an action upon such instruments; and yet a complaint upon any other species of simple contracts must show the consideration upon which it is founded, or it will be radically defective.

In the case of *Allen v. Patterson* (7 N. Y. 476), it was held that a complaint was sufficient which in substance stated that the defendant was indebted to the plaintiff in a certain sum of money for goods, wares, and merchandise, sold and delivered to the defendant at his request, on the 1st day of May, 1849, at the city of Buffalo; that the items of account are twenty in number, and then concluding as follows: And the plaintiffs say that there is now due them from the defendant the sum of three hundred and seventy-one dollars and one cent, for which sum the plaintiffs demand judgment." It has been said in some of the subsequent cases

New York that this complaint was not an authority as to the standard of *definiteness and certainty [*133] required in pleadings, but it was not considered so defective as to warrant the court in sustaining the general demurrer interposed to it. Nor does the case of *Allen v. Patterson* come within section 162 of the New York code, which provides that in actions upon written instruments for payment of money, it shall be sufficient to set out the copy of such instrument, and then state that there is a certain sum of money due thereon, because that was not an action brought on a written instrument.

Opinion of the Court—Lewis, C. J.

Appellant claims that the case of the *State Telegraph Company v. Patterson* (1 Nev.), sustains his view of the complaint in this case. In that case we merely held that the facts upon which the plaintiff was entitled to recover should be stated—that it was not sufficient merely to state conclusions of law. But where all the facts necessary to constitute a cause of action are alleged, as in this case, we did not hold that a statement of a conclusion of law would vitiate the pleading. We conclude that the complaint is sufficient, and that the demurrer was therefore properly overruled.

As to the question raised upon the cost bill, we are unable to perceive how it can be reviewed upon this appeal. There is no statement or bill of exceptions. The appeal is simply from the judgment, which shows no irregularity in the allowance of costs. The motions made by the appellant, long after the appeal was perfected, to strike out the cost bill, cannot be reviewed upon an appeal from the judgment. The cost bill is no part of the judgment-roll, and is not properly before us; we cannot, therefore, inquire into its regularity, nor into any proceedings which were taken after the appeal from the judgment was perfected.

Where there is no statement, and the appeal is simply from the judgment, nothing is brought to the appellate court but the judgment-roll. (Practice Act, Sec. 280.) The mistake in the calculation of the amount for which judgment should be rendered, ought to have been called to the attention of the court below, and a motion made there to correct it, if that could be done. Such a point cannot properly be raised in the appellate court for the first time. *City of Los Angeles v. City of San Francisco*, 5 Cal. 417. However, we deem it our duty to correct the error, but to impose the costs of this appeal upon the appellant.

The court below will therefore reduce the judgment from one hundred and fifty-eight dollars, which is the sum in excess of that for which properly judgment should have been rendered.

ly, 1866.]

HOWARD v. RICHARDS.

Opinion of Beatty, J., concurring.

By BEATTY, J., concurring:

I concur in the opinion of the majority of the court in every part thereof, except as to the judgment for costs. To make my views on that branch of the case more intelligible, I will make a succinct statement of the facts.

On the eighteenth of December, 1865, the court ordered judgment to be entered for the plaintiff, as prayed for in the complaint. On the nineteenth, and before the judgment was formerly entered up by the clerk, the court made an order staying proceedings for ten days, to enable defendants to perfect an appeal.

A notice of appeal was served and filed on the twenty-eighth day of December, 1865.

On the twenty-ninth, the judgment was entered up by the clerk, and on the same day, an undertaking on appeal was filed.

On the twenty-sixth of December, for the first time, the plaintiff filed his cost bill, amounting to \$194.75, which was included in the judgment entered by the clerk on the twenty-ninth.

On the eighth of January, 1866, the defendants gave notice of intention to move to strike out the costs from the judgment. This motion was made, and the court below refused to strike out the costs. Upon this state of facts, the question presented to our consideration is whether that part of the judgment which calls for costs should or should not be held to be erroneous.

Section 197, of the practice act, requires the clerk, within twenty-four hours after verdict (except in particular cases), to enter judgment in conformity therewith.

Section 453 provides that "the party in whose favor judgment is rendered, and who claims his costs, shall deliver to the clerk of the court, within two days after the verdict or decision of the court, a memorandum of the items of his costs, etc., etc. Taking these two sections together, and it is plain what should be the proper practice. Whenever there is a general verdict for one of the parties to a suit, or an order of court for judgment on either

Opinion of Beatty, J., concurring.

side, it becomes the duty of the clerk to enter up the judgment within twenty-four hours after such verdict or [*135] order. But, as the *successful party has two days within which to file his cost bill, it is evident that the judgment may be entered one day before the time for filing expires. Consequently, the clerk in entering the judgment must of necessity leave a blank therein for the costs. If the cost bill is filed in time, it becomes his duty to fill that blank. If not filed in time, then the blank remains in the judgment, and cannot afterwards be filled.

But when the blank is filled in it becomes a part of the judgment, and must be for most, if not all purposes, considered as of the date of the judgment. In the case of the *California State Telegraph Company v. Patterson*, 1. Nev. 151, this court held, that an appeal might be taken from a judgment when such judgment had been ordered by the court, and a minute made of such order, although the formal judgment had not been regularly entered up by the clerk.

And I think it must be held, that when the final judgment is entered, it may be treated as bearing date by relation as of the time the order for judgment was made. At least for the purposes of appeal, it must be considered as of that date. In this case, the judgment must be considered as of the date of the eighteenth of December, when the judge ordered judgment to be entered. The clerk should have entered up the judgment either on the eighteenth or nineteenth of December, leaving a blank for the costs. No cost bill being filed before the end of the twentieth, the judgment (had the clerk performed his duty at the right time) would have become complete, and thereafter he could have made no entry in or alteration of the judgment. But the clerk did not in reality enter up the judgment until the twenty-ninth. This, I think, could not alter the rights of the parties. The judgment was rendered and the clerk ordered to enter judgment on the eighteenth. Within two days thereafter the plaintiff should have filed his cost bill. Failing to do so, I am of the opinion he lost his right to costs. (See *Chapin v. Broder*, 16 Cal. 418-19.)

Then if the plaintiff had no right to file his cost bill after

Opinion of Beatty, J., concurring.

20th, how were the defendants to take advantage of that lure? Clearly, I think, by appealing from the judgment. The costs were a part of the judgment, and if improperly included in the judgment it was error. It might be very proper in such case, *after the judgment was [*136] the clerk made to include costs, to move in the lower court to correct the judgment, and not to appeal from the judgment until the lower court had refused relief. But the lower court did refuse to correct it, then the appeal should be from the judgment and not from the order refusing to correct the judgment.

The statute provides for appeals from orders made after judgment, but in such cases the appellant is not heard to complain of anything contained in the judgment. But appellant's theory is that the judgment itself is right, and the error is in something done after judgment. If the judgment, or any part of it, is to be attacked, the appeal must be from the judgment.

If, for instance, in this case, the court below had stricken the costs from the judgment, and the appeal had been taken by the plaintiff, then undoubtedly the appeal should have been taken directly from the order striking out. For the complaint would be, not that the judgment contained any error, but that an order made after judgment was erroneous. (See *Wells v. Geller*, 1 Nev. 233.)

Then, if the appeal from the judgment was the right remedy, the only other question is: Does the *record* show that the cost bill was filed too late? In other words: Is the fact judicially shown to us that the cost bill was filed at a time when the right to file had elapsed? Respondents contend that on an appeal from the judgment, where there is no statement, the court can only look at the judgment-roll. Section 203 of the practice act, in relation to judgment-roll, reads as follows: "Immediately after entering the judgment, the clerk shall attach together and file the following papers, which shall constitute the judgment-roll: First, the case the complaint be not answered by any defendant, the summons, with the affidavit, or proof of service, and the complaint, with a memorandum indorsed on the com-

Opinion of Beatty, J., concurring.

plaint that the default of the defendant, in not answering, was entered, and a copy of the judgment. Second. In all other cases, the summons, pleadings, and a copy of the judgment, and any orders relating to a change of the parties."

Section 284 of the act reads as follows: "On an appeal from a final judgment, the appellant shall furnish [*137] the court with a copy of *the notice of appeal, the judgment-roll, and the statement annexed, if there be one, certified by the clerk to be a correct copy. On appeal from a judgment rendered on an appeal, or from an order, the appellant shall furnish the court with a copy of the notice of appeal, the judgment or order appealed from, and a copy of the papers used in the hearing of the court below; such copies to be certified by the clerk to be correct. If any written opinion be placed on file in rendering the judgment, or making the order of the court below, a copy shall be furnished. If the appellant fail to furnish the requisite papers, the appeal may be dismissed.

Now, whilst the last section says what papers an appellant shall bring before this court, it does not say expressly that none others shall be brought; and even if it had said so, I am of the opinion such law would have been wholly inoperative, null and void. The Constitution gives the right of appeal to this court. No law of the legislature could deprive the court of the power of looking into the record to determine the rights of appellant.

The legislature may prescribe the terms and mode of taking appeals, and may limit the time within which appeals are to be taken; but, under the pretense of prescribing terms, it cannot deprive parties of substantial rights. But I am of opinion the legislature never intended this court to be restricted to the examination of these things mentioned in section two hundred and eighty-four. That section does not even provide for bringing up the undertaking on appeal, and without that this court could not know there was an appeal. It makes no provision for bringing up bills of exceptions, yet the manner of settling such bills is provided for in another section.

Opinion of Beatty, J., concurring.

When an appeal is taken from a judgment, this court must, necessity, look into the record to see if there is anything therein to sustain the judgment. We must look at the complaint to see that it contains a statement of facts sufficient to warrant the judgment rendered.

We must, also, if there is no answer, look at the summons and return, to see that the defendant has been properly brought into court. So, too, if there is a judgment for costs, it appears to me we must look into the record to see if there is any foundation for that *part* of the judgment; for, without a cost bill, there is no jurisdiction to render any judgment for costs. If, upon looking at *the [*138] cost bill, it appears from that instrument that there is an error in the judgment, it must be corrected. For that purpose we must have the power of causing it to be certified to this court.

Nor is there anything new or startling in this doctrine. The judgment-roll, as directed by the statute to be made up, neither includes bills of exceptions, the verdict of the jury, nor the findings of fact by the court. Yet all these things constitute a part of the record; and, in California, under a practice act very similar to our own, they have held that a case may be reversed on a bill of exceptions, where there is no statement. So, too, the verdict of a jury or finding of facts signed by the judge, although neither embodied in a statement or bill of exceptions, may, in connection with the pleadings, afford grounds for the reversal of a judgment. (See *Reynolds v. Harris*, 8 Cal. 617-18; 5 Cal. 40-51.)

I conclude, then, that section two hundred and eighty-four, which says what the appellant shall bring up, does not preclude the bringing up of other matters of record in case where they are necessary to determine the rights of the parties.

In conclusion, I hold the judgment should be treated as judgment of the date of December 18, 1865. That no bill of costs having been filed on or before the 20th of December, the judgment that day was perfected, and the blanks of costs could not thereafter be filled up. It appearing

Points decided.

from the filing of the cost bill that it was not filed before the 26th, it was a nullity, and that part of the judgment which is for costs is erroneous. That part of the judgment should be stricken out, and the appellant should recover his costs.

I think the order of court staying proceedings has nothing to do with this question. The order was not intended to stay the filing of a cost bill, and certainly it was not so understood by the plaintiff, for he filed his bill whilst the order was in full force.

L. S. BOWERS, RESPONDENT, v. H. H. BECK ET AL.,
APPELLANTS.

[2 NEVADA, 139.]

BILLS OF EXCEPTION—WHEN PART OF THE RECORD.—As a general rule, bills of exception once signed and filed, become a part of the record.

BOND TO RELEASE ATTACHMENT—NEED NOT BE STAMPED.—A bond given to release property taken under a writ of attachment is a bond given in a legal proceeding, and does not require a stamp.

IDEM—WHEN SUIT UPON MAY BE BROUGHT.—Where a bond is given for the use of a party to an action, but is in the hands of an officer of the court, the beneficiary of the bond may bring suit thereon before the bond has come into his possession.

ATTACHMENT FOR FRAUD—SUFFICIENCY OF.—Where a debtor tells a creditor that he has disposed of all his property, and will pay when he gets ready, it creates a strong suspicion of fraud, and is a sufficient foundation for a belief in the creditor's mind that a fraud has been committed.

IDEM—WHEN MAY BE ISSUED.—If there is some evidence to justify the belief on the part of an attaching creditor that fraud is contemplated or has been committed, he may sue out an attachment, and on the trial, that fraud may or may not be established; but if plaintiff fails on the trial to establish the fraud, still the issuance of the attachment was not a void act. Great strictness in the form of the affidavit should not be required, as the defendant is protected by bond.

FINDINGS—BOND TO RELEASE ATTACHMENT.—What is recited in a bond to be true, is taken as true against the obligor, and need not be averred or proved. It is only necessary to make averments and proof as to what was done after the execution of the bond, and as to the breaches thereof.

BOND NOT VALID WHETHER ATTACHMENT SUSTAINED OR NOT.—Where a bond for a release of goods under an attachment is conditioned for payment, if judgment is rendered against the owner of the goods attached, it becomes absolute upon the rendition of judgment whether the attachment is or is not sustained. (LEWIS, C. J., dissenting.)

Opinion of the Court—Beatty, J.

—There is nothing in the policy of the law to forbid a bond [*140] given to release property from attachment, being enforced according to the very letter of its condition. (LEWIS, C. J., dissenting.)

PEAL from the Fourth Judicial District, Hon. C. C. WIN, presiding.

the facts are stated in the opinion.

Wells & Clark, for Appellant.

Wells, Fitch and J. Neely Johnson, for Respondent.

BY BEATTY, J.:

[*142]

There was an action brought on a bond given to release property held under attachment.

Bowers brought suit against G. W. Atkinson for some thousand six hundred and sixty dollars, and at the time filing his complaint, also sued out a writ of attachment. Attachment was levied on certain property, and the defendants in this action, in conjunction with defendant in former action, executed a joint bond conditioned as follows:

Now, the condition of this obligation is such, that whereas, a writ of attachment was issued against the above named George W. Atkinson, at the suit of L. S. Bowers, certain of his goods and chattels have been attached thereon and by virtue thereof.

Now, in consideration of the release of said goods and chattels from such attachment, if the said George W. Atkinson shall well and truly pay any judgment and costs that said L. S. Bowers may recover against him, the said George W. Atkinson, then this obligation to be null and void, otherwise to remain in full force and effect.

“G. W. ATKINSON, [L.S.]

“H. H. BECK, [L.S.]

“H. A. KENDALL, [L.S.]”

Opinion of the Court—Beatty, J.

Judgment was rendered for plaintiff. He attempted to make the same by issuance of execution, and failing [*143] to collect it of Atkinson *he demanded the amount from the sureties on the bond. They failed to pay, and Bowers instituted this proceeding.

The complaint sets out the indebtedness of Atkinson to the plaintiff, the suing out of the writ of attachment, the making and filing the necessary affidavit, and undertaking to procure the issuance of the attachment, and that the sheriff to whom the attachment was issued made a levy on personal property. That, to procure the release of said property, defendants made, executed, and delivered the bond sued on. That the property, on the delivery of said bond, was released. The rendition of the judgment, the failure to collect the same on execution, the demand on defendants, etc.

The substantial defenses set up in the answer are: First. That the attachment under which the property was seized, was void for want of a sufficient affidavit. Second. That on trial it was found and adjudged that the facts alleged in the affidavit were not true, and therefore the goods were not legally attached.

Upon the trial of the suit between Bowers and Atkinson, whilst the main issue was found for Bowers, it was at the same time determined that the attachment has been issued improperly, or without sufficient evidence, and the same was discharged.

There is a question, however, in this court, whether the discharge of the attachment in the suit of *Bowers v. Atkinson* was shown in the court below.

When this case was first called, appellants suggested a diminution of the record. This motion, and the affidavits filed in support thereof and in opposition, brought out the following facts: One of the counsel for appellants, after judgment for respondent, prepared a bill of exceptions, setting out fully the proceedings on the trial and exceptions taken by the appellants. An associate counsel for appellants, in looking over the bill of exceptions, thought there was an omission in the statement as prepared by the other

Opinion of the Court—Beatty, J.

ounsel, and made an interlineation supplying that supposed mission. The counsel who first prepared the statement then took it to the judge and procured his signature thereto. Some time afterwards, when the court had adjourned for the term, the judge's attention was called to the bill of exceptions he had signed. He thought that part of it which was contained in the interlineation was not correct, and he struck it out by scratching his pen over the interlineations. He *makes an affidavit that he made [*144] this correction because he signed the bill of exceptions without examination, relying on the statement of counsel that it was correct and assented to by opposing counsel, when, in fact, the records of the court clearly showed that appellants had never introduced any such evidence as was stated by the interlineation to have been introduced, and, in fact, that defendants never introduced any evidence at all.

This court is called on to decide whether they will act on the bill of exceptions as originally signed by the judge, or as corrected by him after the interlineation was struck out.

As a general rule, we think a bill of exceptions once signed by the judge and filed among the records of the court (especially after the expiration of the term at which it was signed and filed), becomes a record in the case and beyond the control of the judge. At least, it would be a very dangerous practice to allow amendments and alterations at a subsequent term of the court. Still, we are not prepared to say, if a judge inadvertently signs a bill of exceptions which states a fact which never existed, that it may not in any case be corrected.

If the minutes of the court or other documentary evidence should clearly show the mistake, probably it might be corrected in the court below. But that point it is not now necessary to decide. In this case, it is evident that the judge mistook the meaning of the clause he struck out. He struck it out because the record showed defendants had never introduced such evidence, nor any evidence. Retaining it in the bill of exceptions, it does not show, or purport to show, defendants introduced any evidence. We are in-

Opinion of the Court—Beatty, J.

clined, then, to hold that the bill of exceptions should be considered as it was when signed by the judge, and before this clause was stricken out.

The bill of exceptions, then, shows that plaintiff "offered in evidence the complaint, the affidavit for attachment, and writ of attachment, and return thereon, in the suit of *L. S. Bowers v. Tennessee, alias G. W. Atkinson*." * * * "And the defendants, by their counsel, then and there objected to their introduction as evidence, on the ground that the said complaint showed upon its face that the cause of action sued upon was not one in which the plaintiff could legally invoke the aid and issuance of a writ of attachment; that said affidavit was irregular, and not in compliance [*145] *with the statute in such case made and provided, and insufficient to support the issuance of a writ of attachment; was irregularly and illegally issued; was void, and all proceedings thereon were illegal and void, and had been so adjudged by this court, as shown of record in evidence." After the word evidence follows a direction to include the order dismissing the attachment as part of the bill of exceptions. That order is in these words: "Defendants' counsel moved to set aside attachment. The following witnesses were called on part of plaintiff: L. S. Bowers and William Berick; and on part of defendant, A. Jackson, John Dolson, Geo. W. Atkinson, and Kellem. Motion of defendant sustained, plaintiff excepted."

The words italicised and the direction to include the order dismissing attachment are those stricken out of the statement by the judge, but which we shall consider as a part of the statement. But whilst we shall consider this part of the statement in the bill of exceptions, we do not think it shows that either the plaintiff or defendant introduced the judgment or order dissolving the attachment in evidence. The defendants, at the time this order was alluded to, were not offering anything in evidence. They were objecting to evidence offered by plaintiff. Whilst plaintiff was offering in evidence some of the papers filed in the case of *Bowers v. Atkinson*, it would seem (giving a fair construction to this part of this statement) defendants called

Opinion of the Court—Beatty, J.

ention to an order made in the same case, the existence which ought to operate on the mind of the judge as a son for rejecting the other papers. In other words, the defendants would seem to have claimed that the record in *Bowers v. Atkinson* should not be produced piecemeal; but offered, must be offered as a whole, and if the record considered as a whole failed to sustain plaintiff's action, no part it should be received in evidence. The statement does not show that there was an affirmative attempt on the part of defendants to introduce this order as evidence on their behalf. At best, if offered in evidence by defendants, it was only for the special purpose of showing the other papers offered should be rejected. That being the case, the respondents can only be entitled to a reversal of the case on one of two theories: first, that the papers and other evidence offered by the plaintiff and admitted by the court failed to establish plaintiff's cause of action, and entitled defendants to a nonsuit; or, second, *if all the papers [*146] which constituted a part of the proceedings in *Bowers v. Atkinson* were excluded, then the other evidence offered by plaintiffs was insufficient to support the action, and entitled defendants to a nonsuit.

First, let us see how the parties stand, admitting these things to have been properly in evidence which were offered by the plaintiff and received by the court. We have already stated what papers were offered in evidence by the plaintiff. Defendants contend, first, there could be no recovery on the bond because it was not stamped. To this we say the bond was one given in a legal proceeding, and did not need any stamp under the revenue laws of either the state or United States.

The second point made is, that the bond was not in the possession or under the control of plaintiff when the suit was brought, but in the hands of the clerk of the district court for the second judicial district, and was not in plaintiff's power until subsequently delivered to him by order of the court.

It is sufficient that the bond was made for the benefit of the plaintiff, was made payable to plaintiff, and was in fact

Opinion of the Court—Beatty, J.

his bond, whoever had the custody of it. The mere fact that a plaintiff does have the actual custody of a bond when suit is brought, is no reason for abating the action. If he is the legal owner of the bond, and can produce it at the trial, that is time enough.

The third point of appellants on this branch of the case is, that the affidavit for attachment is so defective on its face as not to show any authority for the issuance of the writ; in other words, that the writ of attachment was void, and that being void the bond was also void. This objection naturally divides itself into two propositions: Was the attachment void? If void, does it follow that the bond is void?

The statute says that the clerk shall issue a writ, when an affidavit shall be filed, showing: "First, that the defendant is indebted to the plaintiff in a certain sum (specifying the amount of such indebtedness) over and above all legal set-offs or counter-claims, upon a contract, express or implied, for the direct payment of money, and that such contract was made or is payable in this territory, and that the payment of the same has not been secured by any mortgage on real and personal property. Second, that the de- [*147] ponent *has good reason to believe, and does believe, that one or more of the causes set forth in the several subdivisions of the next preceding section actually exists at the time of making the affidavit, reciting the facts upon which such belief is founded."

We think there is no question that the affidavit in this case conforms to the statutory requirements in everything, except it may be in not "reciting the facts upon which such belief is founded." "Such belief" in this case is the belief on the part of plaintiff that defendant had fraudulently, or was about fraudulently, to convey his property, to hinder and delay plaintiff in the collection of his debt. Plaintiff states that his reason for this belief "is that the defendant herein has, as deponent is informed and believes, fraudulently conveyed, sold, and assigned certain teams, wagons, and property, for the purpose of hindering, delaying, and defrauding his creditor, this deponent, and as deponent is

Opinion of the Court—Beatty, J.

and believes, is about to fraudulently dispose of
est of his property, for the purpose of hindering,
, and defrauding this deponent, his creditor; and
the defendant herein on the twentieth day of April,
5, informed this deponent that he had sold all his
ant's) teams and personal property, and did not own
f the stock, and would 'pay when he got ready,' or
, that effect."

aw says the clerk shall issue his attachment when
makes oath to his belief, and recites the facts on
is belief is founded.

does the language quoted recite any facts on which
opinion might be founded? He recites that he has
ormed defendant had made a fraudulent conveyance.
part of the affidavit is true, is not this a fact upon
e has a right to frame an opinion? But it may be
l that this is mere hearsay evidence, and that he
ave procured the affidavit of his informant. Or it
said that this is too general; that it was merely
the general result instead of stating the particular
ich constituted or showed the frauds. Perhaps it
ecessary in this case to determine these questions.
one circumstance he does state with particularity
on his own information. That is the conversation
with the plaintiff on or about the twentieth
l, 1865. That conversation *as detailed was [*148]
aps enough to establish fraud in defendant
upported by other circumstances, but was certainly
it to create suspicion and a well founded belief in
d of plaintiff that defendant had made a fraudulent
ion of his property. We think when a debtor tells
or he has disposed of all his property and will pay
e gets ready, it creates a very strong suspicion of
nd a creditor may from such language well draw the
ion that a fraud has been committed.

e case of *Connell v. Lassells*, (20 Wend. 77), a ques-
s raised as to the sufficiency of an affidavit to sup-
attachment issued thereon. The affidavit was very
in character to the present one. The court was then

Opinion of Cowen, J., dissenting.

composed of three judges, C. J. Nelson, and Bronson and Cowen, justices. Two of the judges held the affidavit not sufficient. But in reversing the judgment, the chief justice says: "We might possibly have considered it sufficient to uphold the judgment until reversed;" thus intimating that although the facts stated in the affidavit were not of that conclusive character to justify the justice who issued the attachment, still they tended to prove a fraudulent intent and would sustain the jurisdiction of the justice until reversed.

Mr. Justice COWEN dissents.

In his dissenting opinion he says, among other things: "The * * act * * gives an attachment whenever a justice is satisfied, on the facts and circumstances sworn to by the party, that the debtor has fraudulently assigned or disposed of his property, or is about to do it." He then argues that the circumstances detailed in the affidavit are sufficient to show fraud, or at least if such circumstances had been detailed to a jury, and they had found fraud on them, no court would have been justified in setting aside the finding. He thinks the judgment should have been affirmed.

Chief Justice Bronson, in giving an opinion on the subject of attachments (7 Hill, pages 188-9), says: "The facts and circumstances to establish the grounds on which the application for an attachment is made, must be verified by the affidavits of two disinterested witnesses." We have quoted from the opinion because we have not the New York revised statutes to refer to. In 4 Hill, in the case of Faulkner, pages 598 to 602, he discusses what facts must

be made to appear by the affidavit to make the attachment [*149] valid, and concludes: "Now, although the evidence was far from being conclusive, still it had a legal tendency to make out a case, in all its parts, for the issuing of an attachment. Enough was proved to call upon the officer for the exercise of his judgment upon the weight and importance of the evidence; and if he erred in the decision of a question thus fairly presented, the error would not be fatal to the proceedings. It is only when

Opinion of Cowen, J., dissenting.

is a total want of evidence upon some essential point the officer will fail to acquire jurisdiction."

king, then, the views expressed by Mr. Justice Cowen in the case cited from 20 Wendell, or those expressed by Mr. Justice Bronson, in the cases cited from 4 Hill, and which alike uphold the attachment. That is, they hold that the attachment is not *void*, but that the *prima facie* case for attachment may be rebutted by defendant in attachment. We think this is certainly good law. A party suing out an attachment may receive such information as convinces him beyond all reasonable doubt that a fraud is contemplated, and if he waits to get all the particulars so as to set out in his affidavit, the fraud may be consummated before the property is gone before he gets his writ. But if he is allowed to get the writ upon a general showing of the reasons he has for believing a fraud has been practiced, or is about to be practiced, he may, when the case comes on for trial, be able to prove the fraud by satisfactory evidence. The statute is quite different from the New York statute. The latter requires the facts to sustain the attachment to be proved by the affidavits of disinterested witnesses. Ours requires the party to swear to his belief in the existence of certain main facts, and to state the subordinate facts upon which that belief is founded. Certainly, that belief might be founded on information derived from others. He need not introduce the affidavit of others to prove the facts upon which he founded his belief, but if a trial of the question as to the propriety of issuing the attachment arises, he can have the benefit of their testimony.

The statute requires a person suing out an attachment to give bond for all damages caused thereby, if the proceeding for attachment is not sustained. This is sufficient protection for the defendant. We do not think great strictness should be required in setting out the facts to authorize the issuance of the attachment. Not so, at least, as in those states where the attachment serves in lieu of a summons, and authorizes the court to enter judgment against the defendant without actual service on him. This, we are of opinion, was not a void attachment, and the alleged *deficiency of the affidavit* was no defense to this action.

Opinion of Cowen, J., dissenting.

The attachment not being void, let us consider what would have been the situation of the parties, if the court had ruled out the complaint, affidavit of attachment, writ of attachment, and return thereon, as offered by the plaintiff. The bond sued on recited that whereas an attachment was issued and certain goods have been levied on, etc. "Now, in consideration of the release of said goods and chattels from such attachment, if the said G. W. Atkinson shall well and truly pay any judgment and costs that the said L. S. Bowers may recover against him, the said G. W. Atkinson, then this obligation to be null and void; otherwise to remain in full force and effect." Whatever the obligor recites in a bond to be true, may be taken as true against him, and need not be averred in a complaint on such bond, nor proved on the trial. That the goods were under attachment is clearly recited. Perhaps it is not so clearly recited that the goods are released when the bond is delivered, but the language used may mean that they are to be released. In that case, it appears to us, all the plaintiff has to do is to aver the release did take place at or after the delivery of the bond, and then prove the breach on the part of the obligors. If this be so, then there was no necessity for averring the existence of a complaint, affidavit of attachment, attachment return, etc.

This is the view taken by the chancellor of New York and concurred in by the entire court for the correction of errors except one senator, in a case precisely similar to this. See *Kanouse v. Dormedy*, 3 Denio, 567. We entirely concur in the correctness of this decision.

This, we think, disposes of the entire case. But appellants contend that although they did not, after the plaintiff closed his case, offer any testimony, yet they should stand in this court just as if they had regularly offered in evidence the judgment of the court dismissing the attachment, on the ground that plaintiff did not *sustain by sufficient [*151] evidence his allegations to support the issuance of the attachment.

We cannot think that the mere calling of the judge's attention to that order or judgment as a reason for rejecting

Opinion of Cowen, J., dissenting.

er portions of the record of *Bowers v. Atkinson*, when offered by the plaintiff in this action, is equivalent to offering evidence by the defendants.

But, even if it were in evidence, the writer of this opinion is unable to see how it would alter the result. The defendants have voluntarily entered into a bond to pay any judgment that might be recovered. There was no condition in the bond that they would pay provided the attachment was good and a judgment rendered, but simply on condition that the judgment was rendered. Upon what principle can we interpolate the other condition. The parties to the bond did not make any such condition; the statute authorizing the bond does not speak of any such condition. Doubtless, if a bond with such a condition had been tendered, the plaintiff would not have released the goods. The statute does not require him to release them, except on a bond with a single condition, and that is as to the rendition of judgment.

There are only two principles upon which it can be contended that the bond would be void in case the attachment is void, or not supported by sufficient evidence where that case was tried. The one is, that the goods of defendant Atkinson, being illegally held, the bond was given under a species of duress; the other, that it would be against public policy to support bonds given under such circumstances.

At common law, the plea of duress only applied to cases where the person of the defendant was either held in custody, or threatened with violence or imprisonment. That plea could not be sustained by any proof as to seizure or threats against property. Modern American cases have had a tendency to extend that plea, or one similar to it, so as to annul contracts made to avoid threatened destruction or detention of property. But those pleas have never been allowed except in extreme cases, when the danger of destruction, conversion, or asportation was imminent, and no other apparent method of saving the property.

Here there was no such necessity. Atkinson had bonded to indemnify him for all losses sustained by [*152] improper issuance of the writ, and the property

Opinion of Cowen, J., dissenting.

itself was in the custody of the law. (See Parsons Con., vol. 1, 319 to 322, and notes, etc., as to the general rules governing this defense.)

We cannot see in what respect such bonds are contrary to the policy of the law. The defendant in an action of debt or assumpsit has his goods attached. Rather than wait to see whether the attachment can or cannot be discharged in the due course of law, to obtain the immediate possession of his goods, he gives a bond to the effect that he will pay any judgment obtained against him. Now, if a judgment is obtained against him, we see no great hardship in his having to pay it. We do not think it is violating any true policy of the law to make him and his sureties liable therefor, according to the letter of their bond.

In the case of *Cadwell v. Colgate* (7 Barb. 253), it was distinctly held that a bond given to release property seized under a void attachment was itself void. And the case of *Homan et al. v. Brinckerhoff* (1 Denio, 184,) seems to be to the same effect. So, too, it would seem from references made by Mr. Drake, in his work on attachments, that it has been held in Louisiana, or at least strongly intimated, that if after goods were released from attachment by bond, it should be determined that attachment had been improperly issued, the sureties on the bond for the release of the property would be discharged. With regard to the New York cases last cited, the writer of this opinion must say he does not think they are good law. With regard to the Louisiana cases, not having access to the opinions themselves, nor to the statute of Louisiana in relation to attachments, and scarcely any knowledge of the civil law which prevails in that state, I am unable to form any opinion about these cases. I think the true rule is, that when such a bond as the one under consideration is given, you cannot go back to inquire as to whether the attachment was regular or irregular. The only questions are, was the property released, and has a breach of the bond been shown. This is the view taken of such a case by the supreme court of the state of California, in *McMillan v. Dana* (18 Cal. 339), and I think the correct view.

Judgment affirmed.

*By BROSANAN, J., concurring:

[*153]

I concur in the affirmance of the judgment of the district court. I hold that the complaint, though susceptible of much improvement, is sufficient; and that the affidavit upon which the attachment in the original suit was based, answered the requirements of the statute.

Although I do not believe in the doctrine that a court of record loses all power and jurisdiction over all orders and judgments after the expiration of the term at which they may be made and rendered, to the full extent claimed and asserted, yet, for the purposes of this case, I wish to be understood as holding that the statement contains the words erased by the district judge. But this, in my opinion, will not help the appellant's case. With these words in, the record does not show that the order dismissing the attachment in the original suit was introduced, offered, or made evidence in any way in the case.

At that stage of the trial when the plaintiff offered in evidence the complaint, affidavit, and attachment in the original action, the defendants' counsel objected to their competency, and in stating the grounds of objection, assigned one of them in substance, "that the district court had adjudged the attachment, and all the proceedings thereon, legal and void," which objection the court overruled. This is not a statement that the order or judgment of the court to that effect was introduced in evidence; and it is an conceded fact that it was not so introduced. It is no more than stating a ground of objection to the testimony, which may be well or ill-founded, like any other ground or reason assigned. But to hold that such an incidental allusion to what the judge may have done, or to what may have transpired in a different action and between different parties, is tantamount to the actual record proof of the existence of the fact, is a doctrine to which I cannot subscribe. In my humble judgment the record does not contain any legal proof of the dismissal of the attachment in the original action. I am of opinion, therefore, that the judgment of the district court ought to be affirmed.

Opinion of Lewis, C. J., dissenting.

[*154] By LEWIS, C. J., dissenting:

In my opinion the dismissal of the attachment upon the issue raised by the plea in abatement to the affidavit, was a complete defense to the action on the bond, and the judgment of the court below should for that reason be reversed. The statute in certain specified cases authorizes the plaintiff to sue out an attachment against the property of his debtor for the purpose of securing any judgment which he may recover. Sec. 120, of the practice act, declares that "the plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment in the following cases."

If the plaintiff does not show that his case is one of those in which an attachment is authorized, he is not entitled to the security which this summary proceeding gives him. Why should he be if the same fact is established by the defendant upon the issue raised by an answer to the affidavit? If, upon the trial of that issue, the court determines that the plaintiff was not entitled to have the property of the defendant attached, it is a direct decision that he has no right to claim the security which is given by attachment, and that he is entitled to no advantage from the issuance of it. It must be admitted that if the writ is dismissed, the defendant's property taken under it, if in the possession of the plaintiff, or the officer, must be given up or returned, and the plaintiff loses his security. Why should he be in any better position if the defendant has given a bond in accordance with the statute to release his property? The bond is a mere substitute for the property itself. (Drake Attach., Sec. 321.) The statute provides that the bond may be given in lieu of the property as security for any judgment which the plaintiff may recover. If then it is determined by solemn adjudication that the plaintiff was not entitled to have an attachment issue, or to the aid of that collateral proceeding, upon what ground can he continue to hold the security which he has obtained by means of it, and maintain an action upon a bond which it has been ju-

Opinion of Lewis, C. J., dissenting.

ly determined he was never entitled to, and which was
ined by his own wrong?
f the property is released upon the dismissal of [*155]
attachment, upon what reason can it be claimed
the bond, which in fact takes its place, should be held
ecurity against the defendant? It seems to me that
the attachment is set aside, all the proceedings grow-
out of it, must fall with the writ. As an execution falls
the judgment is set aside, so it would seem that the
e proceedings upon a writ of attachment fall when the
itself is quashed. The plaintiff has no more right to
tain an action on the bond than he has to retain the
ndant's property after the attachment is dismissed. If
e determined upon the trial of the issue raised by the
in abatement that the plaintiff is not entitled to have
defendant's property attached, any security which he
have obtained, by means of the writ, is founded upon
own wrong, and for that reason, if for no other, he should
be permitted to derive advantage from it. In Louisiana,
er a statute, as I judge from what is said of it by Mr.
ke, in his work on attachment, secs. 317 and 318, it
held that a dissolution of the attachment was a com-
e defense to the bond given to release the property; and
e case of *Cadwell v. Colgate* (7 Barb. 258), and *Homer v.*
Wackerhoff (1 Denio, 184), it was held that if the attach-
t be void by reason of a defect in the affidavit or other-
s, suit could not be maintained on the bond given to
ase property taken under the writ. If that be the law,
n unable to see why the dissolution of a voidable
chment does not produce the same result so far as the
d is concerned. When the attachment is void there is
ing to support the bond. Being founded upon a void
eeding, it is itself void. So, also, with a bond given,
the writ is subsequently dismissed, the bond having
given in a legal proceeding, and that proceeding hav-
been set aside, the bond should fall with it. The bond
ch case is not given voluntarily, but *in invitum*, and
ld not be treated as if given without restraint to se-
the payment of a just debt.

Opinion of Lewis, C. J., dissenting.

Again, if the attachment be illegally issued and the defendant gives a bond as prescribed by statute to release his property taken under it, he might easily say that it was given under duress of goods, and avoid it on that ground.

True, in England duress of goods is not deemed sufficient to avoid a contract, but in this *country it seems to be recognized as a good defense. (1 Par. Con. 321, note.)

But it is said that the bill of exceptions does not sufficiently show that the attachment was dismissed. In my opinion it does. One of the objections urged to the introduction of the attachment proceedings in evidence was, that the writ had been dismissed, and from the language used in the bill of exceptions I could arrive at no other conclusion than that the order dismissing it was introduced in evidence at the time. It can hardly be presumed that the court would take cognizance of the order unless it were introduced in evidence at the time the objection was taken. If the bill of exceptions shows that it was introduced in evidence, whatever may have been the immediate purpose for which it was introduced, it should receive its full effect as a defense to the plaintiff's action. If the dismissal of the attachment is a complete defense to the action, and that fact is properly brought to the knowledge of the court, it should have its full effect, notwithstanding it may have been brought to the notice of the court at an improper time in the trial, or its full effect escaped the attention of counsel.

The defense is fully before us, and it seems to me should not be passed over merely because it was interposed in the shape of an objection to the introduction of testimony by the plaintiff. I agree with the views expressed by Justice Beatty, that after an appeal is perfected and the lower court has adjourned for the term, the judge below has no authority to correct the record without an order from the appellate court for that purpose. Hence, I conclude that the bill of exceptions should stand as it was at the time the appeal was taken.

If the principal in the bond is living, and was capable of contracting, he should have been made a party defendant

Opinion of Beatty, J., on response to petition.

the sureties. The action is upon a joint contract, and the parties to it should be united. However, this is an objection which could only be taken advantage of on special demurrer, which was not done here. I conclude that the judgment should be reversed, and a new trial awarded.

RESPONSE TO PETITION FOR REHEARING.

PENDING STATUTES—EFFECT OF.—“If the legislature passes an act [*157] amending a former act, but providing the amendatory act shall not take effect until a future day, the old act remains in full force until the amendment goes into operation.

ANS.—So, too, if it is provided in the amendatory act that such amendments shall only be operative for the enforcement of future contracts, the old law is in full force, so far as relates to the enforcement of prior contracts.

By the Court, BEATTY, J.:

The appellants in this case petitioned for a rehearing, and based that petition on three grounds. These we will notice in the order in which they are presented in the petition. The first proposition is stated in these terms: “The demurrer should have been sustained in the district court, because the complaint in the cause does not allege *when* the cause of action sued upon in *Bowers v. Atkinson* arose. The complaint in *this* case should show *per se* that the cause of action in *that* was one in which the plaintiff could legally invoke the aid of a writ of attachment by a compliance with the preliminary requirement of an *existing operative* attachment law.”

*In support of this proposition, it is urged that [*158] the amendments to the attachment law passed in 1864-5, totally abrogate the former attachment law, and as those amendments only apply to debts contracted after April, 1865, no attachment could issue to secure a debt created prior to that time. Reference is made to section 7 of article IV, and section 2 of article XVII of the Constitution, and several California cases, in support of this proposition.

Opinion of Beatty, J., on response to petition.

Section 17 of article IV, is in these words: "Each law enacted by the legislature shall embrace but one subject, and matter properly connected therewith, which subject shall be briefly expressed in the title; and no law shall be revised or amended by reference to its title only; but in such case, the act as revised, or section as amended, shall be re-enacted and published at length."

Now, as the sections amended are re-enacted in full and so appear on the statute book, we do not see what application this section can have, or what light it can throw on the act as amended. The form of the act is this: After giving the title of the act and enacting clause, it proceeds as follows: "Sec. 1. Sec. 120 of said act is amended so as to read as follows." Then follows in full the section as amended. After this comes "Sec. 2. Sec. 121 is amended so as to read as follows."

Then follows in full the section amended. And in this way the act proceeds until six sections of the former act, which are designated by their numbers, are altered and re-enacted.

Then comes the seventh and concluding section of the amendatory act, which is as follows: "Sec. 7. This act shall take effect and be in force from and after the first (1st) day of April, eighteen hundred and sixty-five (1865), and shall not be construed to have reference or application to any contract made prior to the time herein specified." As the last section clearly provides that this act shall have no reference or application to contracts made prior to April, 1865, the question arises whether any law on the subject of attachments does or can exist, affecting such contracts. If we look to the statutes of 1861, we find a law providing for attachments to secure debts in certain cases. Does that law still have any vitality? In express terms it has never been repealed. But certain sections of that law have been amended, and those amendments substituted for the [*159] former sections, so that in effect *the former sections have been totally abrogated, from and after the time the amendments took effect.

The amendatory act was approved and became a law on

Opinion of Beatty, J., on response to petition.

fourth of March, 1865, but provides, by its own terms, is not to take effect until the first of April following. Now, it is clear that although the substitute sections passed in March, the old law remained in force until April. But further, the new law provides it is not to be construed "to have reference or application to any contracts made prior to the time herein specified."

If the legislature could provide that the new sections should not take effect for any purpose until nearly a month after the act was passed (and we think there is no question on that point), could it not provide that they should never go into effect, so far as to affect the remedy concerning former contracts? We see no serious objection to such exercise of legislative power. We think that the language used, taken in connection with the object of the amendment, clearly indicates that it was the intention of the legislature that the law, as passed in 1861, should still be in force as regards all contracts made prior to 1865. The law of 1861 only gave the benefit of attachment when fraud was committed or contemplated. That of 1864-5 extends the benefit of attachment to a very numerous class of contracts where no fraud or unfairness is charged. It is hardly to be assumed that whilst the legislature gave this harsh remedy against the honest debtor, it was the intention to entirely exempt the fraudulent debtor from its operation. The second section of article 17, is as follows: "All laws of the Territory of Nevada, in force at the time of the admission of this state, not repugnant to this Constitution, shall remain in force until they expire by their own limitations or be altered or repealed by the legislature." This does not mean if a territorial law is altered in any of its sections, it shall entirely cease to have any validity, but simply that all such laws shall remain in force, except as repealed, and subject to such modifications as are effected therein by the constitution or subsequent legislation. It does not affect the question under discussion.

We think the attachment law of 1861 remains in force as to debts contracted prior to April, 1865.

'But even if that were not the case, the writer [*160]

want of the proper stamps; that it is not a suffi-
tion to say it "was given in a legal proceedin-
to dispense with the stamps, it should appear
"*required* in a legal proceeding." We are sati-
the sense in which that word is used in the rev-
the United States and of the state, it was "a
legal proceeding." Counsel for the appellant
the affidavit and undertaking, preliminary to
of a writ of attachment, are *required* to be giv-
proceeding, and are therefore exempt from st-
but contend that a bond for the release of prop-
is not *required* in a legal proceeding, because th-
can just as well make his defense to the action
attached property remains in the hands of th-
after he has had it returned to him on the ex-
proper bond. Therefore, such bond is not *req-*
legal proceeding.

We must confess that we fail to see the dis-
is true, the defense to the action might be made
return of the property. It is equally true th-
could obtain his judgment without the issue
attachment. But in the case of plaintiff, the ju-
tained without the attachment might be valuele-
other hand, if the defendant had a good defense

Opinion of Beatty, J., on response to petition.

The third point made by petitioners is that this court holds in its former opinion that the order dismissing the attachment was in *evidence for a special [*161] purpose; and if so, it was in evidence for all purposes, and so showed the attachment was discharged; and, therefore, that the action in this case could not be sustained.

In this assumption we think the petitioners are entirely wrong. Mr. Justice Brosnan, one of the members of the court who concurred in the original opinion, expressly held no such proof was before this court. The writer of this opinion, in several portions of the former opinion, expressed the idea, I think, very clearly, that defendants had *not* offered that order in evidence. The only expression in that opinion which could be construed differently is shown in the words italicised in the following quotation:

"In other words, the defendants would seem to have claimed that the record in *Bowers v. Atkinson* should not be produced piecemeal; but if offered, must be offered as a whole; and if the record, considered as a whole, failed to sustain plaintiff's action, no part of it should be received in evidence. The statement does not show that there was an affirmative attempt, on the part of the defendants, to introduce this order in evidence on their side. *At best, if offered in evidence by defendants, it was only for the special purpose of showing the other papers offered should be rejected.*"

Now, we are not disposed to go into a verbal criticism to show whether the sentence italicised was, or was not, properly worded. But what we do say is this, that if a plaintiff in an action produces on the trial of a case a bundle of papers which were filed in another case, and selects out of that bundle certain papers, which he offers in evidence, and the defendants should object to admitting those selected papers unless the plaintiff would introduce all the papers in the bundle, this would not be equivalent to offering and introducing all the other papers in the bundle on the part of defendants.

Those other papers could not be held as introduced on behalf of defendants, unless they were specially offered and admitted by the court. The fact that the judge before

Points decided.

whom the case was tried, may have read these latter papers before determining to admit those offered by the plaintiff, would make no difference. If one party offers a paper in evidence to which the other objects, the objecting party, as a matter of course, passes the paper to the judge for inspection, in order that he may determine the validity of the objection. This might, perhaps, be said to be put [*162] ting the paper in *evidence for a special purpose; that is, for the purpose of determining its validity as proof of facts set out in the paper.

But if the court should reject the paper as not being competent proof of any fact in favor of the party offering, the party objecting could not resort to the same paper as proof of any fact in his favor. That is the case here. If the order dismissing the attachment was produced to the court, it was only submitted for inspection to show the impropriety of admitting other papers, not to prove any distinct or affirmative fact for defendants, and cannot be considered as having been in evidence.

A rehearing is denied.

LEWIS, J., did not participate in this decision.

JOHN W. KELLER, RESPONDENT, v. H. G. BLASDEL,
APPELLANT.

[2 NEVADA, 162.]

PLEADINGS—AMENDMENT OF COMPLAINT.—A complaint cannot be altered in a material part thereof without notice to defendant. Especially it cannot be so altered as to set out a new and distinct cause of action.

APPEAL from a judgment of the First Judicial District, Storey County, the Hon. RICHARD RISING presiding.

The facts are sufficiently stated in the opinion.

Williams & Bixler, for Appellant.

[*163] **Taylor & Campbell*, for Respondent.

The Court, BEATTY, J.:

It was an action of assumpsit, brought originally by H. G. Blasdel, John Paul, Doctor Pinkerton, ———, John Doe, and Richard Roe, known as the Building Committee of the Methodist Episcopal Church. It was tried in the court below, and a judgment rendered against H. G. Blasdel and ——— Prince. An appeal was taken from that judgment, and from an order refusing a new trial. The evidence in this case was brought up to this court. The principal evidence in the case was that of the plaintiff Keller. This court reversed the judgment of the court below, and sent the case back for further proceedings.

According to the opinion of this court, the evidence of the plaintiff did not tend to make out any case against Blasdel, and thereby negatived his liability. The case made by plaintiff's statement showed that if anybody was liable to the church was the building committee of the church, who, according to his statement, were to sign a written contract, and not sign the same. That committee, or at least the members who were to sign the contract, were Paul, Deal, ———, and Anthony. Blasdel was not one of them. Then, the facts as stated by plaintiff himself, and the opinion of the court, there never could be a joint judgment against the building committee (or those who were to sign the contract) and Blasdel.

The plaintiff might, according to the opinion there expressed, get a judgment against the committee if he could prove some additional facts to those sworn to on the first trial, facts which would, in no way, have been inconsistent with those facts he had sworn to on the first trial. To obtain, therefore, a judgment against Blasdel, he must prove facts consistent with those sworn to on the first trial.

Under this state of the record, a certified copy [*164] of the judgment in this court was taken to the court below.

The case was put on the calendar, set for trial, and proceeded in its regular course. When called, neither Blasdel nor his counsel, nor indeed any of the defendants, were

Opinion of the Court—Beatty, J.

present. The plaintiff moved to amend his complaint so as to strike out the names and description, etc., of all other parties except H. G. Blasdel. The court gave leave to make the amendment; it was made, and the plaintiff proceeded to trial, and obtained judgment.

Blasdel got notice through third parties that the trial was progressing, not in time to make any defense in the case, but in time to make a statement on motion for new trial.

The motion was made and overruled, and he appeals to this court. There are a number of grounds stated why a new trial should have been granted. It will not, we think, be necessary to notice more than two of them.

The appellant complains, and we think justly, that the complaint was amended in a material matter without notice to him. When a party is sued he is only required to answer the complaint served on him; he is not expected without further notice to answer a totally different and distinct cause of action. Blasdel was sued on an alleged joint cause of action against himself and others. He may have been satisfied that defendant would never prove such joint cause of action whether he was or was not present. Or he may have been willing that a joint judgment should go against himself and others to be first made of the joint property, but by no means willing to risk an individual judgment against himself without being present to defend.

It was totally irregular to thus amend the complaint without notice, and when neither he nor his counsel were present. We think, too, the appellant was fairly entitled to a new trial on the ground of surprise. According to the former opinion of this court, and the case made out by the plaintiff's own testimony, it was evident the plaintiff could only recover against the committee who were to sign the contract, if against anybody. The appellant then had a just reason for supposing the case would not be prosecuted against him. He had a right to suppose, either [*165] that the case would be dismissed, or so amended as to be prosecuted against those who were to have signed the contract, and none others.

We do not think appellant was quite as diligent in attend-

Points decided.

ing to the case as he should have been; but it would be a very harsh application of the rules of law which would thus punish a slight want of diligence by sustaining a judgment obtained under circumstances so suspicious and indicative of fraud. Appellant certainly had no right to expect the plaintiff would so far refresh his memory about old and past transactions as to be able to make out a case against him when his former testimony had negatived any such case; or, indeed, to suppose he would try to make out a case entirely at variance with his former statement.

The case is reversed, and a new trial granted.

By LEWIS, C. J., concurring:

I concur in the reversal upon the ground of the amendment of the complaint without notice.

BROSNAN, J., did not participate in this decision.

GEORGE MILLER, RESPONDENT, v. D. W. CHERRY
ET AL. H. GLAUBER, ONE OF DEFENDANTS, APPELLANT.

[2 NEVADA, 165.]

JUDGMENT FOR GOLD COIN ERRONEOUS.—A direction in a foreclosure decree to sell mortgaged property for gold coin only, is injurious to one holding a subsequent lien, and such subsequent lien-holder may appeal from the judgment and have it reversed.

JUDGMENT—MOTION TO SET ASIDE—WHERE MADE.—There being nothing in the record on which this court could act in setting aside the alleged sale under an erroneous judgment, the appellant must seek his remedy by motion in the court below.

APPEAL from a decree of the District Court of the First Judicial District, Hon. R. S. MESICK presiding.

The facts are stated in the opinion.

Corson & White, for Appellant.

Mitchell & Hundley, for Respondent.

Points decided.

[*166] *By the Court, BEATTY, J.:

This was a proceeding to foreclose a mortgage. The appellant was a junior mortgagee, and complains that the decree of the court directs the mortgaged property to be sold for gold coin. There is no doubt but this form of decree is injurious to the junior mortgagee. If so sold, the property would be more likely to be exhausted before the senior mortgage is satisfied. The judgment must be modified on the authority of *Milliken Brothers v. Sloat*; *Hastings v. Burning Moscow Co.*, and other cases decided in this court. The court below will correct the decree by striking therefrom all those portions which direct that any of the mortgage debts be paid in gold coin, and all those portions directing the sheriff to sell for gold coin, and have the decree to read for so many dollars and cents, without designating the kind of money in which it is to be paid. The appellant must recover his costs in this court.

In other respects the decree of the court below will stand affirmed.

We are asked to make an order setting aside the sale made under this decree. There is nothing in the record on which we could base such an order. If the appellant is entitled to such relief, he must seek it by an appropriate motion in the court below.

LEWIS, C. J., did not participate in this decision.

PETER CAVANAUGH v. SAMUEL H. WRIGHT.

[2 NEVADA, 166.]

PETITION FOR MANDAMUS.

¹ SECTION 8, ARTICLE VI, OF CONSTITUTION CONSTRUED—APPEALS.—Under the provisions of section 8, article VI of the Constitution, the legislature may prescribe the mode of proceeding on appeal from a justice's court to the district court. That mode may be by trial *de novo*, or a mere review of the justice's proceedings, as the legislature chooses to direct.

Opinion of the Court —Beatty, J.

THIS was a petition for mandamus from this court directed to the Hon. S. H. WRIGHT, District Judge of the Second Judicial District.

The facts are fully stated in the opinion.

R. M. Clarke, for Petitioner.

A. C. Ellis, for Respondent.

*By the Court, BEATTY, J.:

[*167]

In this case the petitioner, Peter Cavanaugh, was sued in justice's court, and judgment rendered against him. He took the necessary steps to perfect an appeal to the district court according to the provisions of an act of the legislature of the state of Nevada, approved February 26th, 1866, prescribing the mode of proceedings in justices' courts, and regulating the manner of taking appeals, etc.

The act directs that trials on appeal from justices' courts shall be *de novo* in the district court. When this case came on for hearing in the district court, it was objected that the Constitution did not confer on the district court, nor empower the legislature to confer on that court the right to try *de novo* a cause that had been tried in an inferior court. That under the Constitution of the state the district court did not have power to review as upon a writ of error the action of the lower court.

The district court sustained this view of the Constitution, and refused to proceed with the trial of the appeal upon the ground that the court had no constitutional power so to do, and that the act of the legislature authorizing trials *de novo* was unconstitutional and void.

This court is now asked to issue a mandamus to the district judge commanding him to proceed with the trial of the case, and the only question raised on the argument of the case was whether that court had the power under the Constitution to hear the cause *de novo*. The only clauses of the Constitution bearing directly on this point are as follows: Section 6 of article VI, in enumerating the powers of the district court uses this language:

Opinion of the Court—Beatty, J.

“‘They shall also have final appellate jurisdiction in cases arising in justices’ courts, and such other inferior tribunals as may be established by law.’”

Section 8 of the same article, after defining the cases in which justices shall have original jurisdiction, uses this language:

“‘The legislature shall also prescribe by law the manner, and determine the cases in which appeals may be taken from justices’ and other courts.’”

“Appellate jurisdiction,” in its most limited and [*168] technical sense, *means jurisdiction to retry and determine something that has already been tried in some other tribunal.

If we were to give the phrase its most technical and limited meaning, we might rather hold that the framers of the Constitution intended thereby to require that all appeals from justices should be tried *de novo*, than that none should be so tried.

But we are not disposed to give it so narrow and technical a construction. We think, as used in the Constitution, the phrase “appellate jurisdiction” was intended to be used in a broad and comprehensive sense. It was intended to confer jurisdiction upon the district courts to hear cases on appeal either in the strictest sense, which would require a trial *de novo*, or to review them as law cases are reviewed at common law. We think the language quoted from the eighth section clearly confers on the legislature the power to regulate the manner of appeals to the district courts. It might require in one class of cases that upon appeal the trial should be *de novo*, and in other cases a simple review of the proceedings of the court below.

The legislature has required the trial in the district court to be *de novo* in all cases, and we think it had the right to do so; the law is not in conflict with any constitutional provision. We see nothing in the fourth section of article VI of the Constitution, which confers appellate jurisdiction on this court, which militates against the views we have herein expressed.

The district court of Ormsby county will proceed to hear,

 Points decided.

rmine the cause of *Catharine A. Harvey v. Peter*
n the regular course of business of said court.
will be *de novo*.

J., did not participate in this decision.

MINING COMPANY, RESPONDENT, v. THE
JS GOLD AND SILVER MINING COM-
APPELLANT.

[2 NEVADA, 168.]

RIGHTS OF PARTIES TO THE SUIT.—If a plaintiff, pending a suit
t against several defendants, each in possession of distinct
property sued for, sells out to one of the defendants, the
as to that defendant is ended, and he may under his pur-
cure the same suit against the other defendants for such por-
property as they hold.

AMENDMENT OF COMPLAINT.—"In such case the purchaser, [*169]
stituted as plaintiff, cannot amend his complaint so as
other property claimed by himself under a different title.

SCOPE OF LIMITATION.—When an action has been brought in due
ie piece or portion of property, it would be bad practice to
omplaint to be so amended as to include another piece of
hich would otherwise be protected from recovery by the
imitations, and thus embarrass the defense under that statute.

RIGHT OF RECOVERY FOR UNDIVIDED PORTION OF LAND.—When an undivided
a tract of land is recovered, the sheriff would not be justified
expelling the tenants who are in possession, if they make no
to a joint or common possession by those recovering the

RIGHTS OF TENANTS IN COMMON MAY UNITE IN BRINGING SUIT.—All tenants in
under our statute, may unite in prosecuting an action for pos-
the common property. So one tenant in common may sue
re.

RECOVERY OF A BLIND LODGE.—When a suit is brought for a blind
aded by walls found at the depth of two hundred feet below
the ledge only and no part of the surface can be recovered.

RIGHTS OF MINERS.—The common law doctrine, that he
sees the surface of the earth owns all to the center of earth,
modified as to the rights of miners and others on the public
ie may be entitled to the occupancy of the surface, another
s of mineral running under the same land.

SHERIFF—WRIT OF RESTITUTION.—The sheriff has no authority
party in possession of land not described in complaint or

Opinion of the Court—Beatty, J.

MINING CLAIMS—POSSESSION OF SOIL—HOISTING WORKS.—The fact that hoisting works are erected by a trespasser over a vein of ore, does not give the owner of the vein any right to those works, unless he also is owner, or is entitled to the possession of the very soil on which these works are erected.

APPEAL from a judgment rendered in the District Court of the First Judicial District, Storey County, the Hon. RICHARD RISING presiding.

Charles E. De Long, for Appellant.

Williams & Bixler, for Respondent.

[*171] *By the Court, BEATTY, J.:

On the 20th of November, 1863, Theodore Winters and some seven others, plaintiffs, filed a complaint against the Fairview M. Co., the Croesus M. Co., the Bullion M. Co., the Minerva M. Co., the Superior M. Co., the Alpha M. Co., and the Four-Twenty M. Co., seeking to recover an interest in a certain mining claim, consisting of an "equal undivided eight hundred and seventy-five feet" in a claim described as "The Cosser & Co.'s claim." * * * * *

"Beginning on that certain gold and silver bearing quartz ledge in said district called the Comstock ledge, at the southern boundary of the claim formerly called the Webb and Kirby, and now known as the Chollar claim, and extending thence south along and following said Comstock ledge, with all its dips, spurs, and angles, a distance of 1600 feet, ** and extending on each side of said ledge 100 feet."

The present appellant first demurred to this complaint, and, on the demurrer being overruled, answered, and then, by leave of the court, put in a supplementary answer by way of amendment to the original answer.

Most, if not all, the other companies sued have put in some defense; but their answers are not material, as it regards the determination of the points before us.

No action is shown by the record to have been taken in the case after the answers filed, until the evening of the 12th of May, 1865, when a part of the defendants were served with notice, affidavit, copy of amended complaint, etc.

the notice was to the effect that the plaintiffs, next morning at ten o'clock, would move the court to dismiss the complaint as to the defendant, the Bullion Company, make an order allowing the Bullion Company to be substituted as plaintiff, and also allowing an amended complaint to be filed by the Bullion Company.

At ten o'clock, those defendants who had been served with notice *came into court and protested [*172] against the hearing, on the ground that the notice was insufficient, and appealed to a rule of the court requiring five days' notice of motions of this character.

The judge observed from the bench he would shorten the time, and ordered the motion to be heard at two o'clock the next day. At two o'clock the motion was heard and sustained.

After the order was made as above stated, a notice was served on the present appellant that the court would adjourn to make the orders, which, in fact, had already been made. The bill of exceptions says this notice was served on the appellant on the afternoon of the 16th of May. This date is evidently a mistake, because it is inconsistent with other statements in the same bill of exceptions.

The notice must have been served on the appellant after the 13th before the 16th; probably on the afternoon of the 15th. At the opening of the court on the 16th the motion was denied and sustained. This was in effect only ordering the appellant should be bound by the order which had already been made upon notice to other defendants.

The appellant protested against the whole proceeding as irregular, and calculated to deprive it of a fair opportunity of defending its rights in the case, and excepted to the ruling of the court.

The court ordered appellant to file its answer to amended complaint the next morning (the 17th of May), although it had never been served with copy thereof. On that morning the answer was filed, and the trial of the cause proceeded.

The amended complaint is not for an undivided interest of 15 out of 1600 feet, but for the entire claim known as

Opinion of the Court—Beatty, J.

the "Cosser claim," more particularly described as follows: "Sixteen hundred feet in length upon that certain quartz lode known as the Comstock lode, being the section of said lode bounded on the north by the claim of the Chollar Silver Mining Company, and extending southerly along said lode, and including all the dips, spurs, and angles thereof, a distance of 1600 feet of the said lode, being bounded upon the west by a wall of dark green rock, which appears in the working shaft of the Bullion Mining Company, at a depth of about 460 feet, and in the working shaft of the Chollar Company at a depth of about 425 feet, having a dip [*173] to the east of from thirty to *fifty degrees, and running in a general north and south course, and bounded upon the east by a heavy seam of clay selva which appears at the lower works of the said companies, and lies along the country rock which forms the eastern wall of said lode."

The case went to trial on this amended complaint. The jury found for plaintiff, and judgment was rendered for restitution of the property as described in this amended complaint. After judgment an execution was issued, and the sheriff put plaintiff in possession of certain hoisting works of the appellant. The appellant contending that the judgment did not embrace these hoisting works, moved the court for an order to reinstate it in possession of said works. This the court refused. Appellant appeals from the judgment, and also from the order refusing to reinstate it in possession of the hoisting works.

We think both appeals must be sustained. The original complaint was for only 875 out of 1600 feet, or for an undivided interest of thirty-five sixty-fourths of the whole. This is all the original plaintiffs claimed.

If these plaintiffs sold out to the Bullion Company, doubtless it would have been proper to substitute that company as plaintiff, and allow it to conduct the suit in its own way. We do not see that the fact that the Bullion Company had originally been a defendant could make any difference. Here was a suit for mining ground which seems to have extended over the claims of several companies. If one of

Opinion of the Court—Beatty, J.

These companies, sooner than litigate the suit, chooses to buy plaintiff's claim, it had a right to do so. When that was done, the controversy was settled as to those parties. But in such a case it would not be improper to allow the suit to continue as to the other defendants. But if continued, it must be the same suit, and not a new one. It must be for the property claimed by the original plaintiffs, and not for that property and other property claimed by the new plaintiff, united by a new declaration to that which was originally sued for.

If A. were to sue B. for a horse, and then assign the cause of action to C., C. could not amend his complaint and charge that B. had taken the horse from A., his assignor, and taken the yoke of oxen from C., the present plaintiff. Every one would at once see that this was uniting a new and distinct cause of action, arising to C. *alone, with [*174] the original cause of action which arose to A. To allow this jumbling together of new and distinct causes of action, originally pertaining to different parties, would lead to much confusion and to no good. We have seen no precedent for such a practice, and cannot believe it justifiable. In this particular case, the reasons for refusing to sustain such a course are still stronger than in the case supposed.

A statute of limitations was passed in the latter part of November, 1861, to take effect December 2d, 1861, which limited all actions for the recovery of mining claims to two years after cause of action arose, but said statute not to begin to run against causes of action already existing until after its passage. When the first suit was brought, the statute had not run in any case, and could not be pleaded. This thirty-five sixty-fourths of the 1600 feet was by the bringing of this suit protected from the running of the statute. But in a few days after the bringing of this suit, the right to sue for the remaining twenty-nine sixty-fourths of this claim may have been barred by the statute of limitations.

The appellant claims that such was the case. It certainly had the legal right to try to establish such a defense. It was not good practice to thus mix up two causes of action

Opinion of the Court—Beatty, J.

so as to prevent or embarrass such a defense. We mention this as an illustration of one of the many evils resulting from such a practice. If such a practice were allowed, all a plaintiff, who finds himself about to be defeated, has to do to throw the costs on a defendant, is to assign his cause of action to some one who has a good cause of action against the defendant, and let the new party be substituted and unite a new cause of action, which he can sustain, to the old one, which cannot be supported, and thus mulct the defendant in all the costs. Such a practice is without precedent, unjust, and not to be tolerated.

No doubt when a new plaintiff is substituted, he may, like any other plaintiff, amend his complaint, in a proper case, as to mere matter of form, provided it is substantially the same cause of action as that originally set out. The respondent claims that such was the case here; that, although the original complaint was only for an undivided interest of 875 out of 1600 feet, still, if a judgment had been had under that complaint, the plaintiffs would have [*175] been *entitled to possession of the whole 1600 against the appellant, a mere trespasser.

Upon this point respondent cites several California cases. Some of those cases establish this proposition, that where a plaintiff sues for a tract of land, claiming that he is entitled to the sole possession thereof, and shows on the trial that he is a tenant in common with others in the land, and that he and his cotenants are entitled to the exclusive possession of the property described, he will be entitled to recover the entire tract against trespassers who hold adversely to him and his cotenants. These California cases all seem to be based on the authority of a case in Day's Reports, to which we have no access. Whether they are sound or not (of which, possibly, there is some doubt) we have not thought it necessary to inquire. That is not this case. Here the whole possession was *not* sued for. The judgment could be for no more than was claimed. If the plaintiffs had obtained judgment for thirty-five sixty-fourths, we knew of no law which would have justified the sheriff in entirely expelling defendants from possession if they had

Opinion of the Court—Beatty, J.

ietly submitted to a common or joint occupancy by the plaintiff with themselves. We have certainly been referred to no authority on this point, and with our present light must hold such a recovery would only have entitled plaintiff to a common possession with defendants, and those owning the other twenty-nine sixty-fourths might become barred before the trial of the first suit.

For these reasons, we think the amendment should not have been allowed, and that the judgment rendered on that amended complaint is erroneous and must be set aside. If the Bullion company can recover anything in this case, it can only be the thirty-five sixty-fourths sued for in the original action. This court has ruled that *all* the tenants in common of an estate may unite in one action under our statute for the possession of the common property. It is not disputed one tenant in common may sue for his undivided fraction. But this court has never decided, as counsel for respondent seem to think, that more than one and less than all the tenants in common of a piece of land may unite in such action.

This point being one of much difficulty and doubt, we have not thought it necessary to decide, as this case must be reversed on other grounds. In this case the appellants complain, and we think *not without just [*176] ground, of precipitancy and haste in making the order for change of parties, time for filing answer, etc. But, as the judgment is reversed on other grounds, it does not seem necessary to decide whether this undue haste and compulsion on the part of defendants to answer a new complaint, without time for reflection or consideration, would of itself have been sufficient to set aside the judgment.

The action of the sheriff in putting the plaintiff in possession of the appellant's hoisting works, was a clear and unmistakable trespass. The complaint on which the suit was tried describes nothing on the surface. It describes a *lode* (a Cornish word nearly synonymous with vein) bounded by certain rocks which are found, if we may believe the complaint, only at the depth of several hundred feet below the surface. When found at that depth, they are pitching,

Opinion of the Court—Beatty, J.

says the complaint, to the east at an angle of thirty degrees. Now, if these rocks are the boundaries claim sued for, and the rocks come no nearer than two or three hundred feet, then the vein is nearer than two or three hundred feet. For the vein is the matter contained between those two walls; and where the walls terminate, there the veins terminate—unless there should be a solid ledge arising from the vein, which supports itself without walls. But counsel for defendant seems to think that in an ejectment plaintiff must look from the surface of the earth downwards. They think it would be impossible to recover a vein without entering the surface over the vein. At common law there is no recovery in actions of ejectment and all real actions, even for a portion of the earth's body or substance, save in the form of an inverted cone or pyramid; the surface of the earth recovered being the base of the figure, and the apex at the centre of the earth. But the judgment regarding a ledge, lode, or vein is quite different. It may be a portion of the earth's surface, where that surface is properly located.

The plaintiff would, in case of a surface lode, recover together with the lode following its dips, spurs, and branches, and then be entitled to his pyramid carved out of the earth's body, having its base on the surface and its apex at the center of the earth. But if the lode dipped out of the surface, as they nearly always do, he could also recover the judgment following this lode (usually in the form of [*177] a solid *parallelogram) wheresoever it might extend, at least as far as it might extend under the surface of the lands. But if a party locates a ledge without any outcrop on the surface, he can only recover the ledge.

If the ledge comes to the surface, as is frequently the case, undoubtedly he is entitled to the surface. The ledge could only be where the outlines of the ledge are on the surface.

It will probably be suggested that if a party locates a ledge does not get any of the surface, he cannot get the ledge, and the location will be valueless. This, however,

rather an imaginary than a real difficulty. Nearly all ledges diverge more or less from the perpendicular. The owner has the opportunity of working them from a great many different points. There would generally be no difficulty in finding some accessible point from which the vein might be reached that is not occupied. If all such points are occupied, then he must, like anybody else, buy what he wants.

If we were to hold that a party locating a blind ledge (one which does not show itself on the surface) must have a certain portion of the surface to work his ledge, where are we to give it to him? Nearly all ledges diverge more or less from the perpendicular. Frequently neither a ledge nor the wall rock inclosing veins or lodes reaches to the surface by many feet—sometimes by many hundred feet. Now, if we are to extend such veins to the surface, where no particular surface ground has been located, what rule are we to follow?

If the walls are first found at a depth of two hundred feet below the surface, and at that depth have a dip of forty-five degrees, shall we ascend from the top of the wall rock by perpendicular lines to the surface, and give the ground included between those lines thus produced to the holder of the ledge, or are we to extend imaginary lines from the top of the wall rock to the surface at an angle of forty-five degrees, and give to the ledge-holder the ground between those two lines? It is evident there would be a difference of two hundred feet in the location of the two pieces of ground. To adopt either rule would be to endanger the improvements of others who might erect buildings in ignorance of the true location of the ledge. Sometimes ledges change their dip. At one time they may lie nearly flat, at another they may be nearly perpendicular. Sometimes the same ledge, as is claimed in this place, may dip to the west; then, at a certain depth, change and dip to the east. It *would [*178] be impossible to adopt any sensible and practicable rule for extending to the surface the location of ledges or lodes that are located merely by name as extensions of known or marked ledges, where those locations show no

Opinion of the Court—Beatty, J.

croppings or indications on the surface. It is as necessary in every mining locality to have houses for boarding in, mechanics' and traders' shops, etc., as it is to have mines. They are as worthy of protection as the mines themselves. We cannot adopt any rule that will sacrifice the houses and shops of one class of citizens to promote the interest of another.

Whilst we depart from the rules of the common law so far as to let the miner follow his lode of quartz wheresoever it may go, even though it runs under public land which was in the occupancy of another before the mine was located; on the other hand, the occupier of the surface is equally entitled to protection in the use of that surface, if a miner having a senior location should in the course of time be found to run under his improvements. The doctrine of the common law, that he who has a right to the surface of any portion of the earth, has also the right to all beneath and above that surface, has but a limited application to the rights of miners and others using the public lands of this state. Necessity has compelled a great modification of that doctrine. The departure from those old and established doctrines of the law will, doubtless, lead to many complications. To adhere to the common law rules on this subject is simply impossible. To attempt to carry out common law doctrines on this point would either give all the houses in Virginia to the mining corporations, or else all the most valuable mines to those occupying the houses. The well-established custom of miners to locate veins of mineral, claiming to follow them with all their dips, spurs, and angles, without reference to the occupancy of the surface, has compelled a departure from common law rules.

In this particular case, a shaft sunk in the hoisting works which are the subject of controversy, penetrates the eastern wall rock, passes through it, and reaches the vein at the depth of about two hundred and fifty to two hundred and fifty-five feet. At this point the vein is dipping to the east at an angle of forty-five degrees. The eastern wall rock is, of course, pointing toward a spot on the surface (supposing the ground to be level) some two hundred and fifty feet west

Opinion of the Court—Beatty, J.

the disputed property. Consequently, if the wall re *continued, the most easterly portion of the [*179] n would be over two hundred feet west of the stinging works. If the eastern wall breaks off at any point ve or west of where the shaft is sunk, whether a shorter longer distance, the hoisting works are still in any event t of that portion of the land lying perpendicularly over vein where it comes nearest the surface.

But, say respondents, the vein, where it gets to within o hundred feet of the surface, changes, and has a down-dip to the west, instead of to the east, as it does at a oth of two hundred and fifty feet. That seems to be the ical theory among miners in regard to the Comstock a. But there is no evidence that such is the case at this ticular point of the vein. There is no evidence here of ll rocks approaching the surface nearer than two hundred l fifty feet of the surface. The only croppings of the ge spoken of in the testimony, are eight hundred feet from o hoisting works.

The surface of the ground on which these works are ated is not described in the complaint, the judgment, or ection.

The sheriff had no right to meddle with these works, be- use the plaintiff's lawyers, witnesses, or somebody else, pposed that if certain wall rocks run where, according to ir theory, they ought to run, this piece of land would within those walls.

Respondent makes an argument to prove that hoisting rks are a part of the freehold on which they stand; that ese hoisting works were erected especially to work this ne or lode, and therefore appurtenant to the mine, and et go with it. That the hoisting works belong to the lity, and must go with the land on which they stand, we tainly believe to be a correct proposition. If the plaint- was entitled to recover the land on which they stand, then was entitled to have the works. If it could not recover e land it could not recover the works. How the intention h which the works were erected could influence the plaint- 's right to recover the land on which they stand, we are at as to comprehend.

Opinion of Beatty, J., on response to petition.

If plaintiff is entitled to recover these hoisting works because they were erected to hoist ores from this mine, it would, upon the same principle, be entitled to recover an assay office in Virginia city, or any other place in Storey county, if one was erected there to assay ore from this mine. The object for which the works were erected [*180] *has nothing to do with the question as to who is entitled to the ground on which they stand.

The judgment of the court below must be reversed. The plaintiff will be allowed either to dismiss its action, or to move the court to reinstate the pleadings as they stood before the order was made allowing the amended complaint to be filed.

The court will also make an order directing the sheriff to reinstate the appellant in possession of the hoisting works from which it was ejected.



RESPONSE TO PETITION FOR REHEARING.

TENANT IN COMMON—RIGHTS OF.—A tenant in common suing for only a part interest in the property cannot recover judgment for the whole.

By the Court, BEATTY, J.:

The first point made by respondents in their petition for rehearing is, that this court erred in supposing that the original suit was only for eight hundred and seventy-five feet of ground, and not for sixteen hundred feet. After a careful examination of the original complaint, it still seems apparent to us the suit was for only eight hundred and seventy-five feet.

The complaint avers substantially that plaintiffs and their predecessors were in 1859 the owners of, and in the possession of eight hundred and seventy-five feet, undivided interest in a certain mining claim called the Cosser claim, which claim is more particularly described (here follows the description of a claim of 1600 feet): That subsequently defendants entered on said claim and ousted plaintiffs therefrom, and then winds up with a prayer for the possession of the "mining grounds aforesaid."

Opinion of Beatty, J., on response to petition.

*The "mining grounds aforesaid" might mean [*181] those of which plaintiffs had been in possession, to wit, eight hundred and seventy-five feet, or it might mean the whole sixteen hundred feet. But the gist of the complaint, the very wrong complained of, is that the defendants ousted plaintiffs; ousted of what? Why, doubtless, of eight hundred and seventy-five feet, in possession of which the plaintiffs had been.

There is no allegation in the complaint that plaintiffs were ever in possession of more than eight hundred and seventy-five feet, or that they ever had the right of possession to more.

One tenant in common may be in possession of the entire common property. If in such case he be ousted by a trespasser who is a stranger to the title, we see no reason why, upon a proper complaint, he may not recover the entire premises from the trespasser.

But if he wishes to recover the whole, he must allege his possession of the whole and ouster therefrom; or other facts clearly showing his intention to sue for the whole, and his right to such recovery.

Here, there was nothing of the kind; and under the original complaint no recovery exceeding eight hundred and seventy-five feet could have been had. Then, to amend the complaint so as to seek to recover sixteen hundred feet, was so to amend it as to introduce a new cause of action.

But, argues respondent, even if it was introducing a new element into the suit, and the court below erred in so allowing, this error should be disregarded unless it produced, or reasonably might have produced, some detriment to the other side. And in connection with this proposition, petitioner asserts two secondary propositions: first, that if the action as to seven hundred and twenty-five feet was barred by the statute of limitations, that statute could have been pleaded to this part of the action embracing the seven hundred and twenty-five feet as readily as if there had been a separate action therefor; and secondly, that no such plea could have been successfully introduced in this case, even if a separate action had been brought for the seven hundred and twenty-five feet.

Opinion of Beatty, J., on response to petition.

To the first of these secondary propositions, we say the law may be as stated by counsel. Possibly, if de[*182] fendants had been allowed *time, their counsel might have found an authority for interposing the plea of the statute of limitations as to seven hundred and twenty-five feet. Yet it must be admitted that it is a complicated and not well-settled question. The circumstances of this case, as far as shown in the record, indicate that if a separate action for the seven hundred and twenty-five feet had been brought, that plea might have been successfully interposed. Hurried as counsel for defendants were in this case into their defense, they failed to interpose that plea, and a recovery is had against them, which probably never could have been had under more regular proceedings.

This court cannot sanction such irregular, unprecedented and dangerous practices merely because there is a possibility that counsel on the other side may by great astuteness and readiness be able to ward off threatened dangers. The proceedings in courts of justice should be as much simplified and as little complicated as possible. Such a practice as was indulged in in this case must inevitably lead to confusion, complication, uncertainty and injustice.

As to the other proposition, that the statute of limitations could not have been successfully interposed in this case, we confess that we are totally at a loss to comprehend the reasoning of the counsel.

Counsel state that the original plaintiffs, Winters and others, claimed under the Cosser title; that the defendants claimed under the Buchanan & Smith location; that the possession of one tenant in common inures to the benefit of all his cotenants, etc.; and asks: "If Winters and others were in the actual possession in the proportion of eight hundred and seventy-five to one thousand six hundred undivided of each and every inch of the ground, how is it possible for the Croesus company to have been at the same time in the actual peaceable possession of any part of it under an adverse title?" * * *

"If Winters and associates were in possession as alleged, and as found by the jury, of the premises in dispute, that

Opinion of Beatty, J., on response to petition.

session was good for the other owners—unless adverse them, of which there is no pretense—and would inure to their benefit. As long as Winters and associates so remained in possession there could be no ground for a plea of the statute by the defendants against their co-tenants."

From this language one would suppose that Winters and other plaintiffs had always been in possession of eight hundred and seventy-five feet of the ground claimed for. [*183]

But the plaintiffs' complaint only avers that they were in possession in June, 1859, and remained in possession until ousted by plaintiff on the — day of —, 1863. The amended complaint was filed in May, 1865.

Now, if the ouster took place in the early part of May, 1863, or prior to that time, then Winters and his co-plaintiffs had not been in possession of the eight hundred and seventy-five feet for more than two years, and there was no reason why the statute should not have run against the seven hundred and twenty-five feet.

Taking the original complaint as literally true, it does not negative the idea that the ouster was prior to May, 1863. But it is not unusual for lawyers to allege the ouster to have taken place just before the suit is brought, although, in fact, it may have been several years previous.

Whilst we have nothing positive in the record showing when the ouster did take place, if indeed there ever was an ouster, the facts that much work had been done and valuable improvements put on defendants' claim would indicate that the ouster, if any, took place several years prior to November, 1863, when the original suit was brought. Certainly, the finding of the jury did not prove that Winters and his co-plaintiffs were in possession of eight hundred and seventy-five feet when they brought their action. If they were, we do not comprehend why they brought suit.

The next point which the petitioners seek to have reviewed is our decision as to the hoisting works. Petitioners urge that the hoisting works were between the walls of the vein, and attempt to show it in this way: They say the shaft con-

Opinion of Beatty, J., on response to petition.

nected with the hoisting works is entirely in *vein matter* from the top down, as shown by Mason, a witness for the defendants, and then put their argument in this form:

"Every vein must necessarily have, and has, two walls, and all matter embraced within those walls and denominated 'vein matter,' is a part of the vein. The hoisting house and machinery was upon, and the entire shaft in, *vein matter*. Therefore, they were between the walls of the vein or ledge."

[*184] *By the same process of reasoning, it may be proved that a man is a horse. Every man is an animal, and every horse is an animal: therefore, every man is a horse.

Admitting that every vein has outside walls, and all matter between those walls is *vein matter*, it certainly does not prove that all *vein matter* is contained between two walls. Vein matter may certainly be removed from between its original walls either by artificial or natural means, and after such removal it does not cease to be *vein matter*. When we say that certain substances are *vein matter*, we may mean that those substances are now a component part of some mineral vein, or that at some past time they did constitute a part of the substance of some vein. It is well known that what miners call *vein matter* frequently rolls down a mountain side to a great distance from its original location in the vein. By the action of water it is carried to still greater distances. The hoisting works in this case were on the side of a mountain.

They may have been on *vein matter* which had rolled down the mountain for an indefinite distance. There is certainly no satisfactory evidence to show those works were within the walls of the ledge sued for, and, therefore, the sheriff, under a judgment for a quartz ledge, had no right to interfere with those works.

The fact that the original complaint sues for the ledge and two hundred feet on each side of it can make no difference. The case was not tried on that complaint; therefore, the first complaint has nothing to do with the question. This court only decided the sheriff had no right, under that

Opinion of Beatty, J., on response to petition.

rticular judgment, to interfere with defendants' hoisting rks. It did not decide what would be the effect of a lgment for the lode and two hundred feet on each side reof. That is a question not now before us.

Petitioners again go into a long argument to show that use to which a thing is put may determine whether it is not a fixture.

Admitting the proposition to be true, we do not see its plicability to this case. A large building erected on the soil th steam engine, etc., for hoisting ores we fully admit to be ixture. But a fixture to what? To the soil on which it ands? The difficulty with plaintiffs here is, not that they led to show that such a building was a fixture (we are not are that any one disputes that), but they failed to show any ght of possession to the soil on which the building ands. If plaintiffs were entitled to the soil on [*185] ich this building stands, they would have been tited to the building if it had been erected to grind corn. If they were not entitled to recover the soil, they could t recover the house standing thereon, although it was ected for the purpose (unlawful, perhaps, if you will) of king ore from plaintiffs' mine. The purpose for which a use is erected cannot change its locality. Nor can we see w that purpose is to affect, in any way, the rights of antiffs to recover the ground on which it stands.

The petition for rehearing is denied.

BROSNAN, J., did not participate in this decision.

Opinion of the Court—Beatty, J.

C. GOTTSCHALL ET AL., APPELLANTS, v. G. MELSING
ET AL., RESPONDENTS.

[2 NEVADA, 185.]

MINING CLAIMS—RIGHTS OF MINERS.—A miner appropriating a piece of the public domain for mining purposes has a right to the exclusive possession of the ground so taken up.

IDEM.—A miner cannot by mere notice take up a piece of mining ground and hold it for five years without work or occupation; especially, when there is not even an intention to work it, except on the happening of a very uncertain event.

STATUTE OF LIMITATIONS.—Under some circumstances lapse of time is a good defense, although the statute of limitations is not specially pleaded.

APPEAL from the District Court of the First Judicial District, Hon. R. S. MESICK presiding.

Pitzer & Keyser, for Appellants.

Hillyer & Whitman, for Respondents.

[*186] *By the Court, BEATTY, J.:

This was an action in the nature of an action of ejectment, brought by the plaintiff in the month of October, 1865, to recover possession of a considerable tract of land in the center of the town of Gold Hill.

The property sued for contains a large number of houses, mills, etc., of great value in that town. The plaintiffs, to sustain their cause, proved that they and their grantors (two of the present plaintiffs being original locators and a third a grantee of one of the original locators) located a mining claim in 1859. That claim as located was 900 by 400 feet, and included the property in controversy. The location was made by putting up a notice of the claim, and sticking up a post at each corner of the parallelogram.

Subsequently, it was ascertained this location interfered with a mining *location of older date. The boundaries were then so contracted as to leave out the portion interfering with the older location.

The plaintiffs then went to work and prospected the claim, working on it at intervals from September, '59, to December, '60, both inclusive.

he result of this prospecting was to show the ground liberately rich in gold, so rich that it would have been a valuable mining location if water had been obtainable.

In the absence of water, which the country does not afford in its present state, the ground was worthless for mining purposes. The claim, therefore, was not worked, the parties ceased to occupy or use it in any way, but reserved their intention of holding on to it, to be worked at a future day in the event water was brought by artificial means to the district, and to be had in sufficient quantities for mining purposes. At the time this location was made, there were one or two cabins on it occupied by others than locators. Since its location, there has never been water enough to work the claim except at one time, which was during the winter of 1861, which was a remarkably wet year. Then, as the water only lasted a short time, it was not available for mining purposes. Since the location of a piece of ground for mining purposes the main street of Old Hill has been run through it, and it is compactly built with houses for its whole length.

Whilst this ground was being built up, the plaintiffs occasionally gave notice to those who were improving that they claimed it for mining ground, and expected to occupy and mine it, if ever water was brought in.

Upon the plaintiffs resting, the defendants asked for a nonsuit. The court granted it, and plaintiffs appeal.

Whilst we cannot fully concur with the judge who wrote the opinion sustaining the nonsuit in all the views which he expresses, we are perfectly satisfied with the result at which he arrived. We are satisfied the nonsuit should have been granted. The judge who tried the cause in the court below seems to think the plaintiffs showed a good and subsisting right to mine the ground in controversy in case water should at any future time be brought into the district. But he decides that the right to mine in the ground and extract the precious metals therefrom gives only a qualified right of possession to the miner; that others have [*188] the right to occupy ground which has been appropriated for mining purposes, so long as such occupation

Opinion of the Court—Beatty, J.

does not interfere with the free use of the ground for mining operations; that as this ground cannot at present be used for mining purposes, because of the want of water, the occupation of it by others is not an infringement of the rights of the miners, and therefore they have *at present* no right of action.

We cannot see that the miner stands in any different relation to the government from that occupied by others holding possession of any part of the public domain.

All persons settling on the public domain are mere licensees or tenants at will of the government (except in those cases where a party is protected by some pre-emption or homestead law), and we can see no reason why one who appropriates a portion of the public domain for mining purposes is less entitled to the sole and exclusive possession of the ground appropriated than one who appropriates a piece of the same public domain for a garden or a building lot. Indeed, law and custom have given the miner in some respects the advantage over all other appropriators. A mere notice of appropriation or intention to appropriate a certain piece of ground for mining purposes when the proper season arrives, has generally been held to be a sufficient appropriation by a miner, whilst one wishing to appropriate for other purposes can only hold by an actual appropriation and occupation. We are of the opinion the plaintiffs' proof in this case shows they have no right whatever in the premises sued for. Whilst the law facilitates the taking up and holding of mining claims until the proper season of the year arrives for working them, it discourages the holding on to such claims without working them for long and indefinite periods.

The limitation of actions for mining claims is two years. For other actions for the recovery of real estate it is five years. The whole policy of the law is against appropriating the public mineral lands, and holding on to them without work. We do not think a party can go on to the public lands and lay a claim to a portion thereof for mining purposes, prospect the same and then leave it for an indefinite time and still retain his rights therein. Doubtless a miner

take up a claim and hold it until the proper season of year arrives for working it, without forfeiting rights—and if a *season of unusual character (a [*189] dry one, for instance) should intervene, he might wait for a second season. But we do not think a locator can, by mere notice, take up a mining claim and hold it for five years without work or occupation, and without intention to ever work it again, except upon the happening of a very uncertain event, to wit, the bringing of water by artificial means to the district.

If there had been some work for the introduction of water into the district progressing at the time the claim was located, or at the time the locators ceased work thereon, there might have been some reason for suspending work on the mining claim, and awaiting the advent of water. But when such work was in progress, and no certainty that any water would be commenced, it would be altogether unreasonable to withhold the use of the land from other profitable employment because of a mere possibility that the mining locator might, at some future and distant day, be able to use it for mining purposes.

Again, if there were no other objections to plaintiffs' claim, it is clearly barred by the statute of limitations. It may be objected that the statute of limitations was not pleaded, and is therefore not available to the defendants. More modern rulings of courts seem to favor the statute of limitations, and allow of its becoming a defense without being specially pleaded. It has been held in some cases that a general demurrer will be sustained to a complaint which shows on its face that a claim sued for is barred by the statute of limitations. In this case, whilst plaintiffs' evidence shows they rely exclusively on a mining claim which is barred by a limitation of two years, the complaint is silent as to the foundation of the right sought to be enforced, so that the defendants could not know, from anything contained in the complaint, that a limitation of less than five years applied to this action. Consequently, it was not the fault of the defendants' pleadings that the statute was not pleaded.

Points decided.

Under such circumstances the defendants were evidently entitled to either one of two things. They were entitled to all the benefits of the statute of limitations, without a special plea of the statute, or upon the close of the plaintiffs' testimony they were entitled to amend their answer so as to set up that defense. Neither party should be allowed to obtain an unfair advantage by the concealment [*190] *and suppression of facts. The defendants were entitled to every indulgence from the court in making good their defense, because the plaintiffs attempted to evade the law of limitations by concealing the foundation of their claim, and only developing the real nature of the action when they introduced their testimony; and because the claim was a stale one and not founded upon any just or equitable right, but a speculative attempt to deprive innocent parties of their labor and capital invested, without any just compensation.

The judgment of the court below is affirmed.

LEWIS, C. J., concurring. I concur in the judgment of affirmance.

BROSNAN, J., did not participate in this decision.

B. F. HASTINGS, RESPONDENT, v. J. NEELY JOHNSON,
APPELLANT.

[2 NEVADA, 190.]

JURISDICTION OF STATE COURTS.—The state courts have jurisdiction to hear and determine causes left pending in the late United States territorial courts.

¹ GOLD COIN CONTRACT—DEBTS.—When a written promise is made for the payment of a sum certain, payable in gold coin at a day certain, and is followed by a stipulation that in the event it is not paid at maturity the promisee may take judgment for an amount which, in the legal tender notes of the government, is equal in value to the amount of gold coin first mentioned, this is a *debt* for the amount of gold coin first mentioned. The latter clause is a new penalty which cannot be enforced. The judgment must be for the *debt* and interest.

(1) Overruled in 4 Nev. 462.

Opinion of the Court—Beatty, J.

APPEAL from the District Court of the Second Judicial district, Hon. S. H. WRIGHT presiding.

The facts are stated in the opinion.

R. M. Clarke and J. Neely Johnson, for Appellant.

Williams & Bixler, for Respondent.

By the Court, BEATTY, J.:

[*192]

This was an action brought in the second judicial district of the territory of Nevada. The pleadings were perfected in that court, but no trial had. After the organization of the state government, the case was tried and determined in the second judicial district of the state of Nevada. One of the points made on appeal is, that the state court had no jurisdiction of the action of the parties thereto, and therefore that the judgment was void.

This proposition is maintained on the ground that territorial courts were courts created by Congress [*193] and deriving all their authority from that source. That being so created, the state courts could not exercise any control over the records of the late territorial courts without the express sanction of Congress. In support of this proposition, counsel refer the court to three decisions of the supreme court of the United States, to *Hunt v. Palao*, 4 How. 589; *Benner v. Porter*, 9 How. 1, and *Freebone v. Smith*, 2 Wall. 173.

The case of *Hunt v. Palao* was an action of ejectment brought in the territorial court of Florida whilst still a territory. After that territory was organized and admitted as a state of the Union, a writ of error was asked for to bring the case for review. The supreme court refused the writ, on the ground that the court which had rendered the judgment had ceased to exist, and no other court had succeeded to its jurisdiction. For, argues the court, it would be idle to review this decision and pronounce it erroneous, where there be no court to which we can direct our mandate for correction of the error.

Opinion of the Court—Beatty, J.

And in arguing the points raised, the court says, in speaking of the record and proceedings of the territorial court:

“The proceedings are not in the possession of any court authorized to exercise judicial power over them, but in the possession of an officer of another court merely for the purpose of safe-keeping; for the law of Florida does not place these records in the custody of the state court, but in that of the clerk; nor does it subject him to the control of the court in any manner in regard to them.”

Then, so far as the facts of this case were before the supreme court, there was no question as to whether the state laws might give the state court jurisdiction to hear and determine cases that were pending in the territorial courts at the time of the change of government; but simply a ruling that the state courts without legislation had nothing to do with the records or proceedings of the late territorial courts.

But the supreme court did not stop with deciding the point before them, but went on to use the following language: “And, indeed, if it had placed them in the custody of the court it would not have removed the difficulty; for the law of the state could not have made them rec-
[*194] ords of that court, nor authorized any *proceedings upon them. The territorial court of appeals was a court of the United States, and the control over its records, therefore, belongs to the general government, and not to the state authorities; and it rests with Congress to declare to what tribunal these records and proceedings shall be transferred, and how these judgments shall be carried into execution or reviewed upon an appeal or writ of error.” This latter quotation is purely a *dictum*, but coming from a court of great dignity, and being not entirely foreign to the subject under discussion, it is entitled to great weight, but not to the authority of a solemn adjudication of a point at issue before the court.

The case of *Benner v. Porter*, 9 How. 235, was an appeal to the supreme court of the United States, from a judgment rendered in an admiralty case by the territorial court of

Florida, in 1846. The territory of Florida had been admitted as a state of the Union in 1845. But after the admission of the state, the territorial court continued to exercise jurisdiction in the admiralty cases up to the time a United States district court was fully organized. The supreme court simply decided that the territorial court could not, under the Constitution of the United States, exercise such jurisdiction. That after Florida became a state, judicial powers could only be exercised therein by state courts or by United States courts, presided over by judges appointed to hold office during good behavior, whilst the judges of the territorial courts were appointed only for four years. So the question now under discussion was not involved in this case.

But the doctrine in regard to the jurisdiction of state courts, which we have quoted from 4th Howard, having been referred to in the argument of this cause, the court took occasion to explain and modify that dictum.

On page 247 of 9th Howard, Mr. Justice Nelson, in delivering the opinion of the court in this latter case, uses this language: "We have said that the assent of Congress was essential to the authorized transfer of the records of the territorial courts, in suits pending at the time of the change of government, to the custody of state tribunals. It is proper to add, to avoid misconception, that we do not mean thereby to imply or express any opinion on the question, whether or not, without such assent, the state judiciaries would acquire jurisdiction. This is [*195] altogether a different question. And besides, the acts of Congress that have been passed in several instances on the admission of a state, providing for the transfer of the federal causes to the district courts, as in the case of the admission of Florida, already referred to, and saying nothing at the time in respect to those belonging to state authority, may very well apply an assent to the transfer of them by the state to the appropriate tribunal. Even the omission on the part of Congress to interfere at all in the matter, may be subject to a like implication. And a subsequent assent would doubtless operate upon past acts of transfer by the state authority."

Opinion of the Court—Beatty, J.

Now, the Constitution of Nevada provides for the transfer of all pending causes from the territorial to the state courts. Congress receives the state into the Union, and admits her representatives who present themselves under said Constitution without objection.

Congress makes no provision for these pending causes, nor any provision for the custody of the records of the late territorial courts. Here it appears to us is such a tacit assent to the action of the state authorities as the court seems to intimate would be sufficient.

The case in 2d Wallace seems to throw no new light on this subject. Besides, it appears to us the state courts, on every principle of common sense, ought to have jurisdiction in such cases. The state may prescribe what preliminary steps shall be taken to give these courts jurisdiction as between its own citizens. It may require service to be made by a sheriff, or allow it to be made by a private individual, or by publication. Why not then provide that the state courts shall have jurisdiction of all causes of controversy between its own citizens which have been commenced in the territorial courts, without further service of summons, and why not say the cause shall proceed to trial on such issues as are made up in the territorial courts? So far as the power is concerned, we see no objection. It is true, the records of the late territorial court belong to the general government. Congress has the *power* to do what it pleases with them. It might order them to be removed to Washington city. This might create trouble and inconvenience. But we do not think it affects the question of power. The state may, as long as the records of the territorial [*196] courts are within her *territory and control, use those records as the foundation of civil proceedings to determine the rights of the citizens in its own courts. If Congress should remove these records, or restrain their use by the state courts, some law to substitute copies, or some other remedial statute, would have to be passed by the state.

We conclude, then, on this point, that the state courts have jurisdiction to hear and determine causes left pending

Opinion of the Court—Beatty, J.

the late territorial courts; and the district court did not in hearing and determining this cause.

The obligation on which this suit was brought is in the following form:

“CARSON CITY, N. T., March 30, 1864.

[\$2500.] On the first day of July, A. D. one thousand eight hundred and sixty-four (1864), I promise to pay E. M. Van Kleeck or order twenty-five hundred dollars, in current gold coin of the United States of America, with interest thereon from date at the rate of ten per cent. per annum; and if said sum and interest is not paid when due, in coin of the United States of America, then the said Van Kleeck is authorized to sue for the same, and shall have and recover judgment in a sum of money, in the legal tender notes of the United States of America, shall in amount equal the value in the market of gold above town at the date of said judgment the whole of said sum of gold coin in legal tender notes.

“J. NEELY JOHNSON.”

The complaint alleges substantially, that when suit is brought, one dollar in legal tender notes is only worth forty cents in gold, and prays for a judgment on that basis. The answer alleges they are worth fifty cents in gold. The judgment was rendered for just twice the face of the notes, at the rate of fifty cents on the dollar for legal tenders. There is no statement, and the record, we think, perhaps, fails to show some of the alleged errors. But the record does present the only real question (other than the one of jurisdiction) of importance in the case. That question is, what judgment on the facts presented by the complaint and answer have been for two thousand five hundred dollars, or for what two thousand five hundred dollars in legal tender notes would, at the time of breach of contract, been worth legal tender notes?

This, we confess, is a question somewhat embarrassing. [*197] We are not called on here, as under the specific contract act, to enter a judgment declaring the plaintiff shall not be paid in that which the law of the government says shall be a legal tender for all private debts

value of two thousand five hundred dollars in reduced to the standard of legal tender note think there are certain inflexible rules of law w^l admit of such a judgment.

The instrument sued on certainly creates a debt of two thousand five hundred dollars. ' its terms payable in gold does not make it less instrument is at the beginning in form of a prom for two thousand five hundred dollars, and in date at ten per cent. per annum. This note is a sort of penal clause, attaching a penalty or what judgment shall be rendered if it is not turity. Under the rulings of this court in se there can be no question but that defendant, o fell due, might have discharged the note by the two thousand five hundred dollars, and ten p terest thereon, in legal tender notes. He co discharged it, because the note is a *debt* in its nical sense, and the law has said legal tender ne a tender for all *debts*.

Now, if the defendant could have paid the legal tenders the day it fell due, it appears to u entitled to do the same by tendering, in add debt, the accumulated interest and costs, and th error to render judgment for a larger amount.

This is somewhat similar to an ordinary pen

Opinion of the Court--Beatty, J.

pears to us a very similar case, only the real sum to be paid is mentioned first, *and the consequences of [*198] non-payment at the day of maturity follows, instead of preceding that sum, as in ordinary penal bonds.

There is also another objection to enforcing such a contract according to its letter. It appears to us to be contrary to the policy of the law to enforce a penalty against a party for doing what the law says he may do—for paying his debts with that currency which the law says shall be a legal tender for all debts.

We hold, then, that the judgment in this case should have been for two thousand five hundred dollars and interest thereon at the rate of ten per cent. per annum from the date of the note, and it was error to render judgment for any greater amount.

It is stated by counsel for respondent, that certain liens have attached, and certain rights have grown up under this judgment which would be injuriously affected by a reversal, but might be preserved under a modification of this judgment, so made as to give the appellant all the relief to which he is entitled, but not to destroy the lien of the judgment.

As such course seems to be equitable and just under the circumstances of this case, we will make such order as will at once give the appellant the relief to which he is entitled, and preserve the lien of the respondents.

It is, therefore, ordered that if the respondent, within ten days after the filing of this opinion, shall file with the clerk of the district court of the second judicial district of the state of Nevada, a release from all of said judgment, except the costs in the court below and the sum of twenty-five hundred dollars principal, and interest thereon from the 30th day of March, A. D. 1863, at the rate of ten per cent. per annum, and will enter the costs of this appeal as a credit on the remainder of said judgment, the judgment of the court below, so modified, will be affirmed; otherwise this court will, after the expiration of ten days, make an order reversing the judgment of the court below.

If any money has been collected on this judgment, or

Points decided.

any sales made hereunder for an amount in excess of what remains due on this judgment, after the same has been reduced in accordance with the views herein expressed, the court below will make all necessary orders to protect the rights of appellant.

[*199] *It is further ordered that a remittitur may forthwith issue in this case.¹

LEWIS, C. J., did not participate in this decision.

LOUIS McLANE, JR., APPELLANT, v. ABRAMS ET AL,
RESPONDENTS.

[2 NEVADA, 199.]

INTEREST ON NOTE AFTER MATURITY.—The statute gives damages at the rate of ten per cent. per annum for the withholding of money generally. But for withholding of money which bears a higher rate of interest by contract, a corresponding damage for withholding is allowed.

[*200] *And that higher interest is allowed although the contract itself does not provide for such higher rate after maturity of the debt.

CONSTRUCTION OF STATUTES BY OTHER STATES.—When the legislature of one state adopts the laws of another state, it is presumed to adopt the construction which is placed upon it at the time of its adoption.

FORECLOSURE OF MORTGAGE.—REASONABLE COUNSEL FEES.—A court of chancery may allow the mortgagee a percentage for the expense of collecting his mortgage when the instrument provides for such allowance. The allowance for a foreclosure suit should not always be the full amount mentioned in the mortgage, but a reasonable amount not exceeding that provided for.

APPEAL from a decree of the District Court of the First Judicial District, Storey County, Hon. R. S. MESICK presiding.

The facts are sufficiently stated in the opinion.

Williams & Bixler, for Appellant.

Quint & Hardy, for Respondents.

(1) A similar order was made in another case, governed by the same principles, between the same parties.

(2) 1 Nev. 533; 5 Nev. 15; 7 Nev. 23; 8 Nev. 312.

(3) 1 Nev. 161.

03] *By the Court, LEWIS, C. J. :

The principal questions involved in this appeal are, first, is a promissory note, providing for the payment of three and a half per cent. per month interest, but which does not, in express terms, continue that rate of interest after maturity of the note, bear the stipulated rate after maturity, or only the legal rate? and, second, are the defendants entitled to counsel fees and commissions under the stipulations of the note? The note or instrument upon which these questions arise reads as follows :

"VIRGINIA CITY, August 12, 1863.—One year from date, we, the undersigned, for value received, we jointly and severally promise to pay M. Abrams, or order, the sum of three thousand dollars; with interest thereon at the rate of three and one-half per cent. per month, said interest to be paid monthly at the end of each month, calculating from this date; and if said interest is not so paid, then the whole sum, principal and interest, shall become at once due, payable, and collectible; and in any case said principal and interest, or either, are not paid when due, and the holder hereof shall have occasion to bring suit for collection of the moneys due hereon, and shall incur such suit, then we promise to pay the further sum of one per cent. upon the whole sum due and unpaid for attorneys' fees and commissions upon said collection. This note is given for a loan made to us of three thousand dollars in gold coin of the United States, and all payments to be made in the gold and silver coin of the United States, and in any other mode otherwise."

It is urged, on behalf of the appellant, that upon this note interest at the legal rate only can be recovered after maturity, and the following authorities are relied on in support of this position: *Brewster v. Wakefield*, 22 How. 118; *Ludwick v. Huntzinger*, 5 Watts and Serg. 59; *Henry v. Thompson*, 1 Minor, 209.

To the correctness of these decisions, under the [*204] authorities upon which they were made, we give our ready assent. It is a familiar rule of the law of damages

Opinion of the Court—Lewis, C. J.

(in the absence of express statute providing a different rule) that upon the breach of a contract for the payment of money the measure of damages shall be the legal interest on the sum due to the plaintiff from the time of the breach; and notwithstanding parties may have agreed upon a different rate of interest in the investment, it would not by any means be presumed that such interest was to continue after the maturity of the instrument, unless the parties to it expressly contracted that it should, because it could never be presumed that the promise to pay interest extended beyond the time when the principal was agreed to be paid. After the maturity of a promissory note, the express promise or undertaking of the maker ceases, and the instrument itself, as it were, becomes *functus officio*. As in the absence of express provisions it could not be presumed that the promise of a party extends beyond the time limited in the written contract for payment, the statutes existing in all the states give the party a remedy which otherwise he probably would not have by allowing him to recover legal interest on his debt from the time of its maturity until it is collected, as damages for the breach of contract. But it will not be denied that, when not prohibited by usury laws, an agreement between parties, fixing a higher rate of interest or damage after maturing, would be enforced. So, too, it must be admitted that it is perfectly competent for the legislature of any state to provide by law that the same rate of interest agreed upon by the parties to be paid before the debt becomes due, shall be allowed after its maturity, instead of the legal rate. As it is admitted that the makers of the note and mortgage in this case have not expressly promised to pay any rate of interest at all after the maturity of the debt, it becomes necessary to determine whether the statute of this state does in fact make the interest agreed upon in writing by the parties to be paid, without expressly mentioning that it shall be paid after maturity, the measure of damage to be allowed after the maturity of debt, or whether, to authorize a recovery of more than the legal rate of interest after a debt becomes due, it is necessary that there be an express promise to pay more than the legal rate after maturity, or *until the debt is paid*.

Opinion of the Court—Lewis, C. J.

*The result of our examination of the statute is, [*205] at all instruments whereby interest is agreed to be paid shall bear the same rate after maturity and until the debt is paid as they do before. It is provided by section four, page 100 of the Laws of 1861, that "*when there is no express contract in writing fixing a different rate of interest, interest shall be allowed at the rate of ten per cent. per annum for all moneys after they become due on any bond, bill, or premium note,*" etc. And section five declares that parties may agree in writing for the payment of any rate of interest whatever on money due, or *to become due*, on any contract. Any judgment rendered on such contract shall conform thereto, and shall bear the interest agreed upon by the parties, and which shall be specified in the judgment." Giving to the language of this fourth section a liberal and its most natural construction, the purpose sought to be accomplished by the framers seems to have been simply to establish a uniform rate of interest in all those cases where there is no express contract in writing fixing a different rate. It is only where there is no contract in writing fixing a different rate that interest at ten per cent. per annum is provided for. By necessary implication, where there is a contract in writing fixing any rate of interest, that rate shall prevail in all cases. But the learned counsel for appellant claims a more restricted, and, what seems to us, an unwarrantable construction of the sections above referred to, which is, that the words "*when there is no express contract fixing a different rate of interest,*" must be taken to mean a contract whereby a different rate of interest is expressly agreed to be paid *after maturity*, as for instance, *until the principal is paid*. It is true, the language of the fourth section might bear this interpretation; not, however, without restricting the words employed more than we can see any reason for. The language employed is sufficiently general to include all contracts wherein the parties have fixed a rate of interest, though there be no express agreement that that rate shall continue after the maturity of the principal. Why, then, hold that the act refers only to those contracts wherein the parties have expressly provided that the interest fixed

Opinion of the Court—Lewis, C. J.

by them shall continue after the maturity of the debt, or until it is paid? The provisions of the fifth section cannot be made to harmonize with such construction. It declares that the "parties may agree in writing for the payment of any rate of interest whatever on money due or to become due," and the judgment rendered on such contract shall conform thereto, and shall bear the interest agreed upon by the parties. These general words are certainly sufficiently comprehensive to include all contracts wherein the interest to be paid is fixed in the instrument, though not expressly to be continued after its maturity.

The judgments here referred to are those rendered upon contracts, wherein the parties have agreed for the payment of some specified rate of interest; not where they have agreed upon its payment after the maturity of the debt. There is nothing in the language of the act to justify its restriction to any peculiar class of contracts. But on the contrary it seems expressly to comprehend not only those contracts where interest is agreed to be paid before the debt becomes due, but also where it is fixed after its maturity. Where the interest is agreed upon in writing for money due, or to *become due*, the judgment shall conform to the contract, and shall bear the same rate of interest. The agreement to pay a certain rate of interest on money to *become due* is certainly not an agreement to pay it after it becomes due, and yet it is clear the judgment on such an agreement would bear the rate of interest agreed on by the parties. If the judgment on such contract is to bear the rate of interest agreed on by the parties, it will hardly be claimed that after maturity and before judgment the debt shall draw a different rate of interest. The provision that the judgment shall bear the rate of interest agreed on by the parties in the contract is clear evidence that it was the intention that such interest should continue from the time fixed in the contract until the debt is paid. There is another and very cogent reason why this construction should be adopted. It is a rule of construction too familiar to require the citation of authorities, that where one state adopts the statute of another, it is adopted with the construction

Opinion of the Court—Lewis, C. J.

on it by the highest court of judicature of the which it is taken. The reason upon which this gives it an importance and weight which should be regarded except upon the most urgent reasons. If the legislature of one state adopts the laws of another, it is bound to know the construction placed upon those laws in the state from which they are adopted, and therefore it adopts that construction with the law— It incorporates into the law the construction [*207] placed upon it at the time it is adopted.

If the courts of the state adopting such laws to give such construction would be almost as unjustifiable as to disregard the clearly expressed will of the legislature before the legislature of the territory of Nevada passed the act under consideration, it had received the construction which we have placed upon it from the supreme court of the state from which it was taken. (*Kohler v. Smith*, 597.)

Therefore, consider ourselves bound by that decision, in the absence of clear and convincing reasons that its authority should not be respected. But much weight is given to the fact that the case of *Brewster v. Wakefield* (22 How. 373) is a later case than *Kohler v. Smith*, and that the latter was virtually overruled thereby. True, the case of *Brewster v. Wakefield* is the later case, but we cannot see how, at the least, it impairs the authority of *Kohler v. Smith*; the first and second sections of the Minnesota act of 1858 effect correspond with the fourth section of our act, and the third seems to have been nothing in the Minnesota act which corresponds with the fifth section of our act, and, in addition, we think, clearly favors the construction given by the supreme court of California. The case of *Brewster v. Wakefield* is therefore not entitled to the same weight in this court as that of *Kohler v. Smith*; and in view of the fact that in the latter case the supreme court of California gave a construction to a statute subsequently adopted by this state, we deem it incumbent upon us to give the same construction, and to hold that the defendant is entitled to the interest agreed on in the note and

Opinion of the Court—Lewis, C. J.

mortgage until the debt is discharged. And to a qualified extent we think the court below held correctly on the second point. There is no doubt but that it is perfectly competent for parties to stipulate in a mortgage that a certain sum, or a certain percentage, shall be allowed the mortgagee for attorneys' fees or expenses, if he be compelled to bring suit to recover his debt. (*Cox v. Smith*, 1 Nev. 161.) By contract in this case, it is agreed that "in case said principal and interest, or either, are not paid when due, and the holder hereof shall have occasion to bring such suit, then we promise to pay the further sum of ten per cent. [*208] upon the *whole sum due and unpaid for attorneys' fees and commissions upon said collection." It is claimed by appellant that the defendants have not been compelled to bring suit; that filing a cross-bill, as they have done in this case, is not bringing a suit. It cannot be denied that they have not brought suit in the strict sense of the words, but a reasonable construction must be given to the language employed by the parties, and effect given to their real intention, if it can be done without violence to the language employed by them. Now, the intention of these parties is obvious. It was to provide for reimbursing the mortgagee for any expense which he is necessarily put to in collecting his debt. In this case they are compelled to come into court to protect themselves; they file a cross-bill, which places them in the same position as if they had filed their bill for foreclosure.

So they are compelled to incur the expense which the parties seem to have provided for by the allowance of ten per cent. upon the amount due and unpaid. But in all cases where attorneys' fees are provided for in instruments of this character, only a reasonable sum should be allowed. The entire sum stipulated should not be allowed to parties where it would be an exorbitant or unreasonable fee. So this court decided in the case of *Cox v. Smith*, above referred to.

There is nothing in the record in this case which would authorize us to say that ten per cent. is an unreasonable compensation for counsel.

The judgment must, therefore, be affirmed.

 Points decided.

By BEATTY, J., dissenting:

I concur in the foregoing opinion, with this exception. I think a court of chancery may judicially notice what is a reasonable fee for conducting business before such court, and when an extravagant allowance is made by the terms of mortgage for the foreclosure of the same, that such court could treat the allowance named merely as a penalty, and make such reasonable allowance only as a prudent man would pay for a foreclosure if the money had to come out of his own pocket and not that of the mortgagor. In this case I think ten per cent. was an extravagant allowance. I think the court below should have only allowed judgment to go for a reasonable amount not exceeding ten per cent. The judge presiding might have fixed it [*209] either upon his own sense of what was right, or he might have inquired of counsel in his court, either under oath or not, according to his discretion.

CHARLES L. LOW, RESPONDENT, v. ALPHEUS STAPLES ET AL., APPELLANTS.

[2 NEVADA, 209.]

COURT—WILL REMOVE CLOUD UPON TITLE.—Courts of equity independent of the statute might, in a proper case, remove a cloud from title.

REM.—Courts of equity will always interfere to protect one from the operation of a deed which is void, or from some cause ought not to be enforced, unless the deed is void on its face, when there is no necessity for such interference.

REM—LOST DEED—POSSESSION OF PROPERTY.—Where the possession of the realty is in a corporation holding for the benefit of the original owners and assignees, and willing to recognize the right of whoever holds the proper assignment or transfer of the property, it is not necessary to bring an action at law preliminary to the establishment of a lost deed, and the removal of a cloud.

SECTIONS 254-5, PRACTICE ACT, CONSTRUED.—The statute (Practice Act, Secs. 254-5) does not restrict any pre-existing right or remedy, but seems to give in some cases a new and more extensive remedy.

JURISDICTION OF STATE COURTS—VOLUNTARY APPEARANCE.—The fact that defendants appeared and filed their answer in the district court of the state, removes all question or doubt which might otherwise have arisen as to whether the record in this case was lawfully removed from the territorial to the state court.

Opinion of the Court—Lewis, C. J.

APPEAL from a decree of the District Court of the First Judicial District, Storey County, Hon. RICHARD B. BROWN presiding.

The facts are sufficiently stated in the opinion

B. C. Whitman, Aldrich & De Long, for Appellants.

Williams & Bixler, for Respondent.

[*211] *By the Court, LEWIS, C. J.:

The appellants in this cause make two points upon which it is claimed the judgment in the court below should be reversed.

First. That the plaintiff upon the trial failed to show and the court to find, that the plaintiff was in possession of the premises at the time the action was instituted; second, that as the suit was commenced in one of the district courts of the territory of Nevada, the state court sustained no jurisdiction of it, and that the decree is therefore void. Were this, as claimed by counsel, a suit brought under section 254 of the civil practice act, which provides for the determination of conflicting claims to real property, undoubtedly the possession of the plaintiff would be indispensable to entitle him to the relief which he seeks. But in our opinion, it is not necessarily governed by the rules referred to. The plaintiff seeks a remedy which courts of equity have always granted independent of any statute where a proper case was made out. The relief sought is a decree to compel certain persons to execute deeds of conveyance to the plaintiff, and to remove a cloud from title. That it requires no statutory provisions to enable a court of equity to award relief in such cases, there can be no doubt.

In speaking of the power of the courts to order [*212] the surrender or *cancellation of instruments which it would be unjust to enforce, or which cast a cloud upon a title, Mr. Story says: "The party is relieved upon the principle, as it is technically called, *quia timet*; the

Opinion of the Court—Lewis, C. J.

ear that such agreements, securities, deeds, or other instruments, may be vexatiously or injuriously used against him; that the evidence to impeach them may be lost, or that they may now throw a cloud or suspicion over his title or interest; *a fortiori* the party will have a right to come into equity to have such agreements, securities, deeds, or other instruments delivered up and canceled, where he has a defense against them which is good in equity, and not capable of being made available at law." (Story Eq. Jur., Sec. 694.) It is held, in all cases where an instrument is void, or should not in justice be enforced, or has a tendency to cast a cloud upon the title of another, and the illegality of the deed or instrument is not apparent upon its face, the courts have not hesitated to decree a surrender or cancellation of the instrument. (Id. 700; *Reed v. Bank of Newburgh*, 1 Paige, 215; *Petit v. Shepherd*, 5 Paige, 493; *Van Doren v. Mayor of New York*, 9 Paige, 388.) Should the instrument show the illegality upon its face, so that its nullity can be ascertained of no doubt, the reason for the interposition of equity to decree its surrender or cancellation does not then exist, and such instrument could cast no cloud upon the title, and there can be no danger that lapse of time will deprive a party of his full defense. It is in such cases only that relief is refused; nor did the plaintiff's right of relief, where sought to remove a cloud from his title, necessarily depend upon his possession of the premises. It is true, when equity applies for any equitable relief in aid of his legal title to real estate, that courts of equity must be satisfied the complainant has a legal title before granting relief. If the possession should be held adversely, the court might well say to complainant: "Establish your right by an action at law, or else this court cannot be satisfied that you have a legal title." But in a case like this, we see no necessity for an action at law. The possession is in an incorporated company, which admits the rights of whoever holds the Robinson title. The plaintiff shows he has a title lawfully derived from Robinson; but that the claim of title has been broken by the loss of some of the deeds. He seeks by this proceeding to establish that claim of title,

Opinion of the Court—Lewis, C. J.

[*213] to have the lost *deeds supplied, and a clo
moved. We see in such case no necessity
action at law to give possession. If he establishes hi
of title, his rights will be acknowledged—no action
will be required. Independent of any statute, th
the plaintiff's remedy was complete in equity; an
withstanding sections 254 and 255 may be sufficient
prehensive to embrace the remedy now sought by the
iff, it will hardly be claimed, we apprehend, that t
ute entirely supersedes the remedy which existed in
ent of it. The statute gives a remedy in cases wh
haps without it none existed. For instance, if the
be in possession, he has a remedy against all person
ing adversely, whether such claim casts a cloud u
title or not; thus far the old equity jurisprudence
court is extended, but further than this we do not
affected. We are, therefore, of opinion that the
be maintained regardless of whether the plaintiff is
session of the premises or not. As to the secon
i. e., whether the district court, before which the ca
tried, had jurisdiction or not, it may be observed
though the cause was commenced in the territorial
the subsequent appearance in the district court of
leaves no doubt that it obtained jurisdiction of the
The record in this cause, together with all othe
transferred from the district court of the territor
of the state, whether by proper authority or not,
consequence; for the defendants by appearing, fili
answers, and trying the cause, will be deemed to h
sented to such transfer; and then, voluntary appea
the state court was equivalent to the issuance of a s
from that court, and the service of same upon then
the action been finally disposed of in the territoria
the jurisdiction of the state courts over the decree
ment might be questionable. But as that questi
not arise here, we do not wish to be understood as
ing an opinion upon it.

The decree of the court below must therefore be a
and it is so ordered.

Opinion of the Court—Lewis, C. J.

LIG, MOTT & CO., RESPONDENTS, v. THE LAKE
BIGLER ROAD COMPANY, APPELLANTS.

[2 NEVADA, 214.]

EMENT—ASSIGNMENT OF ERRORS.—This court has never held it indispensable that a statement should be made in the court below of the grounds relied on upon appeal, in order to entitle the appellant to a hearing. The exceptions to the rulings of the court below will be treated as a substitute for a statement of the grounds of error relied on.

OF EXCHANGE—PAROL TESTIMONY, WHEN ADMISSIBLE.—When there is anything on the face of a note or bill of exchange showing that the party signing is acting for another, and not for himself, parol testimony may be introduced to bind the principal.

PRINCIPAL AND AGENT—ACCEPTANCE OF NOTE OR BILL.—The question of agency, as to what acts are necessary to bind the principal, discussed: *held*, that a bill headed "Lake Bigler Road Company," signed by Butler Ives, Superintendent," and accepted by "J. E. Garrett, Secretary L. B. R. Co.," was sufficient on its face to charge the company with the acceptance.

—PREVIOUS ACCEPTANCES.—Although the written authority to the secretary did not authorize him to accept bills, yet the fact that he had frequently accepted bills in favor of plaintiff, which were paid by defendants without complaint, was sufficient to bind defendants.

SUIT AGAINST INDIVIDUALS—FIRM NAME.—When a company is sued, under the provisions of our practice act, by its firm name, and subsequently on trial it is proved who compose that company, judgment may be rendered not only against the company property, but against individuals composing that company.

APPEAL from the District Court of the First Judicial District, Storey County, the Hon. RICHARD RISING presiding.

The facts are stated in the opinion.

Water & Flandreau, Clayton & Clarke, for Appellants.

Went & Hardy, for Respondents.

By the Court, LEWIS, C. J.: [216]

We have not yet held a statement of the grounds upon which the appellant relies indispensably necessary before it can be heard in this court, though we have often intimated that if it were omitted we would not feel disposed to

Opinion of the Court—Lewis, C. J.

search through a voluminous record for errors committed in the court below. The neglect of so clear a requirement of the statute and of the rules of this court is utterly inexcusable, and deserves no indulgence from the court. Where, however, it is possible, we are always disposed to protect litigants from all costs and expense which might arise from negligence in the preparation of cases for this court. The statement on appeal shows the rulings of the court below and the exceptions taken; and heretofore in such cases we have taken such exceptions as an assignment of errors. As the court has heretofore countenanced this loose practice, we do not feel justified in enforcing the strict rule until after the members of the profession have been notified that such shall be done. The principal questions on this appeal arise upon the ruling of the court below admitting in evidence the bills of exchange upon which the action is brought. Several objections were interposed to their introduction, only one of which it will be necessary to examine, viz.: that the bills were not the paper of the [*217] defendant or defendants mentioned in the *complaint.

These bills, which are three in number, are in the following form:

“LAKE BIGLER ROAD COMPANY,
“ \$2000. “ CARSON, January 15, 1864.
“ Four months after date, pay to the order of Messrs.
Gillig, Mott & Co., two thousand dollars, with interest at
two and one-half per cent. per month till paid, value received, and charge the same to the account of
“ BUTLER IVES,
“ To J. E. GARRETT, Secretary, Carson.” “ Superintendent.”

We find that each draft is accepted by the drawer in the following manner: “J. E. Garrett, Secretary L. B. R. Co.” It is claimed by the plaintiffs that the drafts were given by the superintendent of the Lake Bigler road company, and accepted by the secretary, for goods furnished the company, and that their officers had the authority to bind the company by drafts of this kind on the secretary. Upon the trial, an effort was made to establish their authority, after

When the drafts were offered in evidence, objected to by the defendant, and admitted by the court. Of this ruling the defendant complains: first, because it is claimed the drafts themselves do not purport to be the bills of the Lake Bigler Road Company; and second, because parol evidence is inadmissible to charge a person upon a negotiable instrument who is not a party thereto. We agree with counsel that if there be nothing in the instrument itself indicating an intention to bind the principal, the agent alone is liable on the note; but if there be anything on the face of the instrument showing that the person signing it was acting for another, and not for himself, parol evidence is admissible to charge the principal. Upon this point Mr. Justice lays down the correct rule, as recognized in all the American authorities. With respect to contracts not under seal he says: "It is very clear from the authorities that it is not indispensable, in order to bind the principal, that a contract should be executed in the name and as the act of the principal. It will be sufficient if upon the whole instrument it can be gathered from the terms thereof that the party describes himself, and acts as agent, and intends thereby to bind the principal, and not to bind him-

"*(Story Agency, Sec. 160. See also *The [*218] England Marine Insurance Company v. James Welf*, 8 Pick. 56; *Hovey v. Magill*, 2 Conn. 680; Story on Agency, Secs. 154-5; *Pentz v. Stanton*, 10 Wend. 271; *Wend v. Hubbard*, 4 Hill, 351.) But the authorities only do not sustain the learned commentator in the comprehensive doctrine which he says is maintained by the more modern authorities, i.e., "that if the agent possesses due authority to make a written contract not under seal and he makes it in his own name, whether he describes himself to be an agent or not, or whether the principal be known or unknown, he, the agent, will be liable to be sued, will be entitled to sue thereon, and his principal also will be able to be sued, and be entitled to sue thereon in all cases, unless from the attendant circumstances it is clearly manifest that an exclusive credit is given to the agent, and intended by both parties that no resort shall in any

Opinion of the Court—Lewis, C. J.

event be had by or against the principal upon it." (Sec. 160.) Few, if any, of the authorities cited support this proposition of the text. It will be found upon examination that those cases, where the principal had been charged when there was a written contract not disclosing an intention to charge the principal, or which was executed in the name of the agent, the action was not based upon the written instrument, but upon the transaction between the agent and the third party, independent of the written contract. As, for example, where an agent purchases goods for his principal, and gives a note signed by himself for the consideration-money, an action could not be maintained against the principal upon the promissory note; but the vendor of the goods might repudiate the note and maintain his action for goods sold and delivered against the principal. Parol evidence would not be admissible to vary or contradict the written instrument by making the contract of the agent that of the principal. Most of the cases cited by Mr. Story in support of the more comprehensive doctrine which he speaks of, are cases of that character, and not actions brought on the written instrument. Doubtless, most of the apparent conflict and confusion in the authorities arise from a failure to make this distinction—a point which Mr. Justice Story certainly did not seem to observe in the authorities cited by him in support of his text. The dictum of Baron Park, in *Higgins v. Senior*, 8 Meeson & Wels. 834, [*219] that "parol evidence is admissible to charge the principal upon a written contract, which in nowise purports to be made for or on his behalf, is not supported by reason or authority, and was utterly repudiated and its fallacy completely exposed in the case of *Fenly v. Stewart*, 5 Sand. 101; and the rule maintained that unless the intention to bind the principal appear upon the face of the written instrument, parol evidence is inadmissible to charge him on it. After a thorough examination of the question, the court say in conclusion that "the distinction appears to be this: where a contract is reduced to writing, whether in compliance with the requisites of the statute of frauds or not, and it is necessary to sue upon the writing itself, there

ou cannot go out of the writing, or contradict or alter it
y parol proof, and consequently cannot recover against a
arty not named in the writing; but where the contract of
ale has been executed, so that an action may be maintained
r the price of the goods, irrespective of the writing, there
ie party who has had the benefit of the sale may be held
able, unless the vendor, knowing who the principal is, has
ected to consider the agent his debtor." So in the case of
e *United States v. Parmele*, 1 Paine C. C. R. 252, Mr.
istice Livingston says: "Courts of law, out of their great
licitude to protect the interest of a principal, have gone
eat lengths in identifying him with his agent or factor,
nd as a necessary consequence have permitted a suit in his
vn name, although he be not, except by implication of
w, a party to it. *But the court does not know that such suit
as ever sustained on the contract itself, where one in writing
k place between the factor and vendor, in which the name of
e principal did not appear.*" And the authors of *American
eading Cases* say in their note to *Taintor v. Prendergast*,
at "not only must the name of the person for whom the
engagement is entered into appear in the instrument, but a
lation of agency between himself and the person making
e engagement must be disclosed on its face." (1 Am. L.
s. 628.) These decisions rest on the rules of law, that
person can be charged upon a written contract except
ose who are parties to it; that in an action upon said con-
act or agreement the whole liability must be made out on
e instrument itself, and that parol evidence is not admis-
ble to alter, add to, or vary it, which is clearly
ne when it is admitted either to discharge *one [*220]
rty or to substitute or add another to it. (*Fenley
Stewart*, 5 Sand. 101.) But if the name of the principal
d the relation of agency between himself and the person
aking the engagement is disclosed on the face of the
reement, parol testimony is admissible, to determine the
pective liability of the principal and agent. (1 *American
eading Cases*, 632, where, in the note to *Taintor v. Pren-
rgast*, this whole subject is elaborately and learnedly re-
wed. Indeed, the entire current of authorities seems to

Opinion of the Court—Lewis, C. J.

that the agency of Garrett, and his intention to act for the company only, is sufficiently apparent from the instruments themselves, and that if his authority to execute instruments be established, the road company is bound upon the bills. It is a patent fact, observable in more modern authorities, that there is a growing disposition to favor such construction of any words which may be in written instruments executed by an agent, and from such an agency may be inferred, as will make the instrument the contract of the principal, rather than that of the agent.

Perhaps out of a laudable desire to carry out the real intention of parties to mercantile transactions, courts have in many cases gone beyond the sanction of the strict rules of law; nevertheless, when from a fair construction of an instrument not under seal, an intention is evident to act for and on behalf of the principal, and that fact is known to the party with whom the contract is made, we think the principal, and not the agent, should be held upon it. Contracts by factors, insurance agents, and ship masters, entered into in their own name, are exceptions to the rule, as we have stated it; the principals in such cases are held upon the same principle as the dormant partner. It has become a custom for those classes of agents to contract in their own names, and the principal is therefore presumed to authorize them so to execute all contracts on their behalf (see on Agency, secs. 162, 164); and as these agents usually have a personal interest in the contract, the agent or principal may sue or be sued upon it. Whether this exception is well founded or not we do not pretend to say. Courts have, however, made the exception; the decisions upon these classes of contracts are, therefore, not contradictory in a case of this kind.

One can look at the bills upon which this action is brought without at once conceding that the acceptance was on behalf of the company. They are headed "Lake Bigler road company," signed by "Butler Ives, [*222] Sec'y," and accepted by "J. E. Garrett, Sec'y L. B. Co." The bill appears to us to be the draft of Butler

Opinion of the Court—Lewis, C. J.

be against the dictum of Baron Park and the statement of Mr. Justice Story. (1 Am. L. Cas. 626; *United States v. Parmele*, 1 Paine C. C. Rep. 252; *Newcomb v. Clark*, 1 Denio, 226; *Pentz v. Stanton*, 10 Wend. 271; *Fenn v. Harrison*, 3 Tenn. 761; *DeWitt v. Walton*, 9 N. Y. 571; *Skiffu v. Walker & Rawlestone*, 2 Camp. 308; *Emily v. Lye*, 15 East, 6; *Stackpole v. Arnold*, 11 Mass. 27; *Mayhew v. Prince*, 16 Mass. 54; *Fenley v. Stewart*, 5 Sandf. 101; *Bradlee v. Boston Glass Man.*, 16 Pick. 347; *Alfridson v. Ludd*, 12 Mass. 173; *Menard v. Reed*, 7 Wend. 68; *Spencer v. Field*, 10 Wend. 87; *Task v. Roberts*, 11 B. Monroe, 201; *Packard v. Nye*, 2 Met. 47; *Barker v. The Bedford Conn. Ins. Co.*, 3 Met. 442; *Thomas v. Bishop*, 2 Stru. 955; *Barker v. The Fire Ins. Co.*, 3 Wend. 94.) Nor does the case of a dormant partner bear any analogy to that of mere naked agency. When an action is maintained against such partner upon an instrument executed in the name of his partner or in the name of the firm, it is upon the ground that the name employed is a representative name, and he is charged as having contracted under that name, and parol testimony is admissible to show that he has adopted such name, or that he is a member of the firm in whose name the contract is executed. Not so, however, when the agent executes a contract in his own name. (1 Am. L. Cas. 634.) It cannot be said that the principal has adopted the name of his agent, except perhaps in certain kinds of contracts hereafter referred to. It will be observed, also, that this is the rule adopted in cases of written contracts not under seal. When the instrument is required to be under seal, a much stricter rule is observed. (*Elwell v. Shaw*, 16 Mass. 42.)

It remains to be determined, then, whether the [*221] bills upon which *this action is brought upon their face sufficiently indicate the intention of the agents to act for and on behalf of the Lake Bigler road company. If not, they must fall within the rule adopted in the cases above cited, and the company could not be charged upon them. After a careful examination of the authorities upon the question of what, in cases of this kind, is sufficient to indicate the agency so as to charge the principal, we con-

ade that the agency of Garrett, and his intention to act for the company only, is sufficiently apparent from the instruments themselves, and that if his authority to execute such instruments be established, the road company is holden upon the bills. It is a patent fact, observable in the more modern authorities, that there is a growing disposition to favor such construction of any words which may be used in written instruments executed by an agent, and from which an agency may be inferred, as will make the instrument the contract of the principal, rather than that of the agent.

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No one can look at the bills upon which this action is brought without at once conceding that the acceptance was on behalf of the company. They are headed "Lake Bigler road company," signed *by "Butler Ives, [*222] agent," and accepted by "J. E. Garrett, Sec'y L. B. Bigler Co." The bill appears to us to be the draft of Butler

Opinion of the Court—Lewis, C. J.

Ives on the Lake Bigler road company, and that the acceptance was by Garrett, on behalf of the company, acting as its secretary.

It is in the form of a request, made to the company through its secretary, to pay the sum mentioned therein to the payees, and to charge the same to the account of Ives, and the company accepts it by its secretary. We think, therefore, that there is sufficient on the face of the instrument to charge the company on the acceptance. It is impossible to reconcile all the cases upon the question of what facts will be sufficient in law to establish the intention to bind the principal; but there are many, wherein it is held that such intention is established by facts much less conclusive than those presented here. In *Hovey v. Magill* (2 Conn. 680), which was an action on a promissory note, drawn by an agent of an incorporated company, and began, "I promise," and was signed in his own name, as agent of the company, Swift, C. J., delivering the opinion of the court, said: "When an agent, duly authorized, subscribes an engagement in such a manner as to manifest an intent not to bind himself, but to bind the principal, and when, by his subscription, he has actually bound the principal, then it is clear the contract cannot be binding on him personally.

"It will be agreed that no precise form of words is required to be used in the signature; that every word must have an effect if possible, and that the intention must be collected from the whole instrument taken together. Who can entertain a doubt, upon reading the note in question, that it was the intention of the defendant to bind the company, and not himself? It is, however, said that he made use of the expression, 'I promise,' which is in terms a personal undertaking; but he has qualified it by adding his character of agent, which unequivocally shows that he did not mean to bind himself. * * * I can see no reason for the addition of agent, but to render the note obligatory on the company, and exclude the idea of individual liability; this is the plain language of the transaction, and we ought to give it the obvious meaning, and not entrap men by the mere form of words.

This mode of signing the note will fairly admit of this construction: I, as agent of the company, pledge my credit, or give their *promise to pay the note; [*223] the company, by me as their agent, promise to pay it. But if we consider the word 'agent' as merely *de-tio personæ*, we give it no operation, and really exclude it from the writing. We are bound, however, to give effect to every word, if possible, and the only way to give this word any effect is to make the note binding on the company."

This is going much further toward charging a principal with such instruments than we feel disposed to go, though this opinion is sustained by numerous well-considered cases. *Adall v. Vechten*, 19 John. 60; *Sayre v. Nichols*, 7 Cal.

Haskell v. Cornish, 13 Cal. 45; *Dispatch Line of Pack-ages v. Bellamy Man. Co.*, 12 N. H. 205; *McCall v. Clayton*, 10 N. C. 422; *Procter v. Webber*, Chip., Vt. 371; *Watts v. Batten*, 14 Vt. 195; *Shelton v. Darling*, 2 Conn. 1; *Johnson v. Smith*, 21 Conn. 627; 1 Parsons' Bills and Notes, 99.)

We do not think the mere fact of placing the word "agent" after the name of him who signs the instrument is sufficient to make it the contract of the principal. If, however, in addition to that, the name of the principal appears upon the face of the instrument, and by a fair and reasonable interpretation of the whole contract it is apparent that the agent intended to bind the principal, whose name so appears upon the instrument, and not himself, the courts should give effect to such intention. There should always be something sufficient in the written instrument itself, without recourse to evidence outside, to make it at least reasonably plain that it is the instrument of the principal whose name appears in the contract. It is, perhaps, impossible to lay down any general rules which will govern all cases of this kind. Whether the intention to bind the principal is apparent upon the face of an instrument is a question which must be determined by the peculiar facts of each case considered in the light of practical philosophy; for the law is presently a practical science. It deals with the transactions

Opinion of the Court—Lewis, C. J.

of a man as it finds them, and judges of his motives and purposes not by some metaphysical or speculative theories, but by those philosophical principles which are drawn from his daily action or conduct. If we look upon the bills presented in this case and judge of the intention of the parties rather by what they have in fact done, than by what they should have done, there can be no doubt of the fact that [*224] they were drawn *on the Lake Bigler road company, and accepted by its secretary on its behalf.

We are unable to see the distinction which the learned counsel for appellants attempts to make in the effect to be given to the word "superintendent" or "secretary" written after the name of the person executing the instrument, and the word "agent." The word "superintendent" or "secretary" as clearly indicates the relation of agency and an intention to represent another as the word "agent," and, whilst we do not pretend to say that any of those words written after the name of a person executing a written instrument, and unconnected with anything else, would be sufficient to show the agency; yet if there be other words and expressions used which also tend to show such agency as in this case, and the form and nature of the contract is such as to bind the principal, we think he should be holden instead of the agent.

It is claimed, however, that Garrett had no authority to bind the company by the acceptance of paper of this kind.

It is clear from the written authority entered upon the books of the company that no power to sign bills or notes could be included in it; but it appears from the evidence in the transcript that the company frequently sanctioned the acceptance of such bills by the secretary, and that similar bills had been given to the plaintiffs and paid by the company. These facts of themselves are sufficient to establish the authority of the agents so far as the plaintiffs in this case are concerned, for it is a familiar rule of the law of agency that where an agent is in the habit of doing certain acts on behalf of his principal, and they are sanctioned by the principal, the agent is presumed to possess the authority to do such acts in similar transactions, and in the course of the same business. (Story on Agency, secs. 55, 56.)

Thus says Chancellor Kent: "Where a person sent his servant to a shopkeeper for goods upon credit, and paid for them afterwards, and sent the same servant again to the same place for goods and with money to pay for them, and the servant received the goods but embezzled the cash, the master was held answerable for the goods; for he had given credit to his servant by adopting his former act."

So where a broker had usually signed policies of insurance for another person, or an agent was in the habit of drawing bills on another, the authority was implied from the fact that the principal had ratified and assumed the acts, and he was held bound by repetition of such acts, where there was no proof of notice or any revocation of power or of collusion between a third party and the agent. (2 Kent, 851.)

The Lake Bigler road company having at various times before the execution of the bills of exchange upon which his action is brought sanctioned the authority of Garrett in similar transactions, they must be holden on their bills upon the law as enunciated by Chancellor Kent.

Neither can we agree with counsel for appellant that the only judgment which can be rendered for plaintiffs in this case is a judgment against the joint property of the company.

Sec. 1 of an act entitled "An act relating to the manner of commencing civil actions," Laws of 1862, p. 120, provides that "in all actions hereafter brought on contract, the defendants may be sued by the name or style under which the contract was made; and upon its being shown on the trial who are the persons of whom the name or style is descriptive, judgment may be rendered against them as now provided by law."

The defendants in this action were sued under the name of the Lake Bigler road company, and upon the trial proof was introduced to show who composed the company; and judgment was rendered against the company, and also against the individual members served with summons, which was in accordance with section 32 of the practice act as it existed at the time of the passage of the act of 1862; but it

Opinion of the Court—Lewis, C. J.

is claimed that this was error. First, because the contract upon which the action is brought is not made in the name of the Lake Bigler road company; and, second, because the words "judgment may be rendered against them as now provided by law," in section 1, above referred to, only authorized judgment against the company *in solido*, for it is said the law at that time provided for no other kind of judgment in cases of this kind. In our opinion the contract of acceptance upon the bills is in the name of the company.

As we have stated before, the drafts are drawn by Ives on the Lake Bigler road company, and accepted by it through its agent, the secretary.

[*226] *That the acceptance by Garrett, though not in the proper form, is in effect the same as if he had signed it "Lake Bigler road company, by J. E. Garrett, Secretary."

We think counsel equally in error in his second objection. It is perfectly clear, from the language of section 1, that it was the intention to enable the plaintiff to recover a judgment which could be enforced against the individual members of companies sued by their company names; otherwise, whence the necessity of proving who are the persons composing such company?

If judgment in such cases can only be rendered against the company, the adoption of the section was utterly useless, for such cases were already provided for by section 581 of the civil practice act. And if judgment in an action upon a contract executed in a company name can only be rendered so as to charge the company properly, we ask whence the necessity of "showing on the trial who are the persons of whom the name or style is descriptive."

The evident intention was to authorize judgment as provided by section 32 of the practice act, when it was shown who the persons were composing the company.

The judgment was so entered, and must be affirmed.

Opinion of the Court—Lewis, C. J.

STATE OF NEVADA, RESPONDENT, v. NATHANIEL L. SQUAIRES, APPELLANT.

[2 NEVADA, 226.]

SECTIONS 1, 2, AND 3, OF THE ACT CONCERNING JURORS (STAT. 1864-5), CONSTRUED.—*Held*, that the provisions of these sections are directory, and that they must be construed in connection with section 323 of the criminal practice act. The judge and assessor are not required to pass on the qualification of each person in selecting names out of which to form a jury. A failure to return the panel at the time required could not prejudice the defendant, if he had ample time after the return to inspect the panel.

CHALLENGE TO JUROR MUST SPECIFY GROUNDS.—The party challenging a juror for cause must specify the particular ground, or grounds, of his challenge.

—WHEN IMPANELED.—A jury is not properly impaneled until they are sworn and charged with the case.

INSTRUCTIONS WHEN NOT APPLICABLE MAY BE REFUSED.—When an instruction is asked and refused, which contains a correct principle of law, but there is nothing in the record showing its applicability to the case on trial, this court cannot reverse the judgment.

—AIDERS AND ABETTORS IN CRIME MAY BE A PRINCIPAL.—One may be principal in the crime of arson who does not himself apply the torch; if he be present aiding and abetting, he is a principal.

APPEAL from the District, Court of the Second Judicial District, the Hon. S. H. WRIGHT presiding.

The facts appear in the opinion.

L. Atwater, for Appellant.

Thomas E. Hayden, for Respondent.

By the Court, LEWIS, C. J.:

[*229]

Before the trial jury were sworn in this case, the defendants interposed a challenge to the panel, upon the grounds: first, that the sheriff did not make return to the venire until the first day of the term; second, because there was no certificate of the district judge and county assessor of the drawing of the jury as required by law; and third, because some

(1) 6 Nev. 128, 320; *State v. Raymond*, 11 Nev.

(2) 1 Nev. 544; 3 Nev. 22; 5 Nev. 99; 6 Nev. 245; 8 Nev. 292.

Opinion of the Court—Lewis, C. J.

of the jurors selected by the judge and assessor were not registered voters, and hence incompetent to act as jurors.

Sec. 3 of an act concerning jurors, approved February 8, 1865, makes it the duty of the sheriff to return the venire issued for the trial jury at least two days prior to the day fixed by law for the commencement of the term of court. Sec. 2 of the same act makes it the duty of the judge and county assessor to certify to the list of names drawn by them to act as jurors at any term of the court; and the first section provides that the district judge of the district and the county assessor of the county in which a term of the district court is, or may be authorized by law to be held, shall, at least ten days prior to the commencement of said term of court, and at the court-house, publicly and alternately select the names of two hundred persons, lawfully qualified to serve as jurors, from the assessment-roll of such county.

In answer to the objections of counsel for the defendants, it is sufficient to say that the provisions of these three sections are merely directory, and unless the irregularity in the execution of them be such as would be likely to prejudice the defendants, it will not be a good ground of challenge.

It could not have been the intention of the legislature to make it the duty of the judge and assessor to pass upon the qualifications of each person selected by them to act as jurors, for that were to require an impossibility. It could not be done. And even if, as suggested by counsel, the names were taken from the register of voters, it would not necessarily follow that persons thus selected would be qualified to act as jurors. The obvious purpose of the legislature was to have all juries selected from among the residents and taxpayers of the county in which they are to perform their duties. Hence, it is made the duty of the [*230] judge and assessor to select *the names of two hundred persons from the assessment-roll, and, in our opinion, their qualifications to act as jurors, beyond the fact of their names appearing upon the assessment-roll, are not to be passed upon by the judge or assessor.

We cannot see that the failure of the sheriff to return the venire two days prior to the time fixed for the commencement of the term prejudiced the defendants. The principal object of that requirement is to give parties an opportunity of inspecting the panel.

The defendants had ample time to inspect the venire before the trial; therefore, they cannot complain of having been injured by the failure to file the venire within the prescribed time. These requirements, so far as this case is concerned, must be construed in connection with section one hundred and twenty-three of the criminal practice act, which declares that a "challenge to the panel can only be founded on a material departure from the forms prescribed by statute in respect to the drawing and return of the jury, or the intentional omission of the sheriff to summon one or more of the jurors drawn.

The errors here complained of are entirely immaterial. We therefore conclude that the challenge of the defendants was properly disallowed.

Upon the challenges to the jurors Little, Wilkin and Vanman, we cannot say that the court below ruled incorrectly; for the challenges were interposed in general terms, "for cause," without a specification of the particular grounds.

Challenges for cause are numerous; some of which are to be tried by the court, and some by triers. Challenges for cause may be taken: 1st. When the juror has been convicted of felony. 2d. For a want of any of the qualifications prescribed by statute to render a person a competent juror. 3d. Unsoundness of mind, or such defect of the mind, or the organs of the body, as renders him incapable of performing the duties of a juror. These are general grounds of challenge, and are triable by the court. Particular cases of challenges are: 1st. For such a bias, as when the existence of the facts is ascertained, the judgment of the law disqualifies the juror, which includes the numerous cases of implied bias, and is triable by the court. 2d. For the existence of a state of mind on the part of the juror, in reference to the case, which leads to the inference that he

Opinion of the Court—Lewis, C. J.

will not act with entire impartiality in the trial [*231] This is *called actual bias, and is to be determined by triers. When a challenge is interposed in general terms, as in this case, how is the court to know the ground of challenge? Whether it is for some general cause, or particular? whether for implied or actual bias? To enable the court to act understandingly, it is necessary to state the particular grounds of the challenge. If that be not done, the appellate court cannot determine whether it was properly disallowed or not. In the case of *Paige v. O'Neil* (12 Cal. 480), Mr. Justice Field, in delivering the opinion of the court, says of a challenge for cause: "It is not sufficient to say 'I challenge for cause,' and then stop, as in this case. The ground upon which it can be sustained, if at all, must be stated." So in 2 Gra. & Wat. New Trials 473, it is said: "When a juror is challenged for principal cause, or for favor, the ground of the challenge must be distinctly stated; for without this the challenge is incomplete, and may be wholly disregarded by the court. It is not enough to say, 'I challenge for principal cause, or for favor,' and stop there; the cause of the challenge must be specified."

In *Mason v. Glover*, 2 Green, 195, the court says: "A party cannot make a principal challenge, or a challenge to the favor, by giving it a name. A challenge, whether in writing or by parol, must be in such terms that the court can see, in the first place, whether it is for principal cause or to the favor, and so determine by what form it is to be tried; and, secondly, whether the facts, if true, are sufficient to support such challenge." Again: the challenge must "state why the juror does not stand indifferent; it must state some facts or circumstances which, if true, will show either that the juror is positively and legally disqualified, or create a probability or suspicion that he is not or may not be impartial. In the former case, the challenge would be a principal one, triable by the court; in the latter it would be to the favor, and submitted to triers."

The fourth ground of error assigned by appellant is, that the court erred in allowing the jury to separate after impanelment, without the consent of the parties.

In support of his position, counsel relies upon section 2, p. 139, of the statutes of 1864-5, which declares that 'after the impanelment of the jury shall be completed in any case, it shall be the *duty of the [*232] judge to order the jury into the custody of the sheriff, or other officer selected by the court; nor shall the jurors be allowed to separate or depart from the custody of the sheriff or said officer, nor be allowed to communicate with any person, until they shall have been duly discharged, unless by consent of the parties to the action.'

We fully agree with the counsel, that it would be error to allow the jury to separate after the impanelment is completed, unless by consent of parties, but in this case no such separation was allowed. It appears that, before the jurors were sworn or charged with the cause, the court allowed them to separate; but not after they were so sworn. In our opinion, the impanelment is not complete, as contemplated by the section above referred to, until after they are sworn and charged with the case. Until that time, the right of peremptory challenges usually continues, and it will be observed from the language of the statute that the impanelment is not deemed complete until the jury is ordered into the custody of the executive officer of the court; and he is sworn to keep them together, and suffer them to have no communication with any other persons. It was evidently not the intention to have the jury ordered into the custody of the sheriff until they had been charged with the cause, and until the opportunity for all challenging had passed. For it would be utterly inconsistent to order the jury into the custody of the officer before they are charged with the cause, swearing him at the same time to keep them together "until they agree upon their verdict, and are discharged according to law;" whilst it is still in the power of counsel to peremptorily challenge one or all of the jurors so placed in his keeping. If, as we believe, the jury should not be ordered into the custody of the executive officers of the court until they are sworn, it follows that the statute only prohibits a separation after they are sworn, for it declares that they shall not be allowed to

Opinion of the Court—Lewis, C. J.

“separate or depart from the custody of the sheriff” until they have been duly discharged. As the record shows no separation of the jury after they were so sworn, we conclude that this objection of counsel for appellant is not well taken.

The fifth assignment of error is upon the ruling of the court below in refusing to give the following instruction, asked by defendant, to the jury:

[*233] **“If the jury find from the evidence that the defendant Squaires was only knowing or accessory to the crime of burning the said building, then he must be acquitted under this indictment.”*

It is unnecessary in this case to determine whether this instruction was correct or not, or whether under proper proof it should have been given or not, because there is nothing in the record before us to show that it was pertinent to the proof. If upon the trial no effort was made, and no evidence was introduced, tending to place the defendant in the position of an accessory, it would have been perfectly proper for the court below to refuse to give the instruction. The purpose of instructions is to declare the law governing some issue of fact established, or attempted to be established, at the trial. Hence, it is always necessary, not only that the instructions asked by either party announce a correct rule of law, but it must be warranted by the evidence. When, therefore, the refusal to give an instruction is complained of, it is as necessary to show its pertinency to the evidence as that it correctly states the law. In the case of *the State v. Waterman* (1 Nev. 544), this court held that when an instruction containing a correct legal principle is refused, and that there is nothing in the transcript on appeal to show whether it was or was not applicable to the case in which it was asked, the appellate court may presume that the refusal was upon the ground that it was not applicable. We cannot say, therefore, that the court erred in refusing the instruction referred to.

It is also claimed that the court erred in refusing to give the following instruction, asked by the defendant:

“If the jury, from the evidence, have a reasonable doubt

as to whether the defendant Squaires set the fire to the building mentioned in the indictment, from which the building was consumed, that doubt must be given to the benefit of the defendant."

This instruction was properly refused. A doubt as to whether the defendant "*set the fire to the building*" would not necessarily render it doubtful as to whether he was guilty, even as principal, in the offense for which he is indicted; for, though he may not have set the fire, he may have been present, encouraging, instigating, and abetting others to set the fire. In such case, though he did not apply the torch himself, he would be principal in the crime. So, too, if he merely stood near to watch and give the [*234] arm, in case of apprehended detection. (2 Russ. r. 26.) And yet counsel assume in the instruction (and given, the jury could have drawn no other conclusion from it), that if they had any doubt as to whether the defendant actually set the fire, they should acquit him, notwithstanding he may have been present aiding and abetting those who did apply the torch. It seems to have been the assumption of counsel that defendant could not be a principal in the crime unless he personally set the fire. This is a mistake. (Stats. 1861, p. 462, sec. 252.) Even at common law, all who were *present*, encouraging, aiding, and abetting, or stood ready to afford assistance, if necessary, were considered principals, either in the first or second degree. (1 Russ. Cr. 25-27.)

This instruction was, therefore, properly refused; and the judgment of the court below must be affirmed.

Opinion of the Court—Lewis, C. J.

JOHN ARNOLD ET AL., RESPONDENTS, v. C. C. STEVENSON, APPELLANT.

[2 NEVADA, 234.]

PARTNERS—NOT BOUND BY MORTGAGE OF COPARTNER.—One partner cannot bind the interest of his copartner in real estate by mortgage.

REVOCATION OF POWER OF ATTORNEY—EFFECT OF DEPOSIT FOR RECORD.—The deposit for record of a revocation of a power of attorney in the proper office operates under our statute as a notice to all parties dealing with the attorney. By such deposit, the revocation becomes absolute without actual notice to the attorney.

DOUBTFUL LAWS—HOW CONSTRUED.—Where the law is doubtful, it is the duty of the court to adopt that construction which will be the least likely to produce mischief and which will afford the most complete protection to all parties, by taking away the power of committing fraud or doing injury.

APPEAL from the District Court of the First Judicial District, Storey County, Hon. R. S. MESICK presiding.

The facts are stated in the opinion.

IV. II. Clagett, for Appellants.

Reardon & Hereford, for Respondents.

[*236] *By the Court, LEWIS, C. J.:

This action was brought to foreclose a mortgage executed as follows:

“Charles S. Coover, C. C. Stevenson,—by Chas. S. Coover, his attorney-in-fact.”

The pleadings and finding of facts by the court show that at the time the debt was contracted and the mortgage executed, the defendants Coover and Stevenson were copartners in a certain quartz mill located at Gold Hill, in the county of Storey; that the defendant Stevenson, on the seventh day of March, 1863, executed to Coover a power of attorney, whereby he was fully empowered to execute the mortgage upon which this action is brought; that this power of attorney was duly recorded on the tenth day of March; and that on the fourth day of December, A. D. 1863,

Opinion of the Court—Lewis, C. J.

Stevenson deposited for record in the same office where the power of attorney was recorded an instrument revoking the power of attorney. Immediately after this was done, he left for the Atlantic States, without giving his agent notice of the revocation, or taking any steps to inform the public of it. On the twenty-second day of January, A.D. 1864, about a month and a half after the revocation had been recorded, the defendant Coover executed the mortgage in the manner above mentioned on the quartz mill owned by himself and Stevenson.

It seems to be conceded that neither the agent nor the plaintiffs had actual notice of the revocation until after the execution of the mortgage. Stevenson now defends this action, claiming that at the time of the execution of the mortgage, the power of attorney had been revoked, and that Coover's execution of it on his behalf was therefore unauthorized.

Judgment was awarded in favor of the plaintiffs in the court below, and the mortgaged premises were decreed to be sold to satisfy the plaintiffs' demand.

In support of this decree, counsel for respondents takes the position here: 1st. That as a partner of Stevenson, Coover possessed the authority to execute the mortgage; and 2d. That the power of attorney was not [*237] revoked by the mere deposit for record of the instrument of revocation, but that to complete the revocation it was necessary to give actual notice to the agent and to those with whom he dealt.

We are unable to agree with counsel upon either of these propositions.

If Coover, by virtue of the partnership relations, had the power to convey or mortgage the real estate of the partnership, the manner in which he signed the deed, so long as it was executed for and on behalf of the firm, would be a matter of little or no consequence. If he possessed the authority to sign the firm name of Coover & Stevenson to the deed, and thereby convey the interest of his copartner, the instrument would doubtless be as effectively executed by the signing of his own name and that of his partner, as he did

Opinion of the Court—Lewis, C. J.

in this case, as if he had signed the partnership name to it. But it is unnecessary to discuss that question, for the law is clear and emphatic that the agency resulting from partnership relations does not authorize one partner to dispose of the real estate of the firm. The general implied powers of a partner do not extend to binding the firm by instruments under seal. (Am. L. Cas. 449, 499.)

Courts of equity, for some purposes and to some limited extent, hold that the real estate of the partnership is subject to the same rules that govern the stock in trade. It is so held for the purpose of making it subject to discharge the partnership liabilities in preference to the personal liabilities of the individual partners, and also for the purpose of giving the creditors of the firm and the continuing or surviving partner a lien upon it for partnership indebtedness; but in the note to *Coles v. Coles* (1 Am. L. Cas. 499), it is said: "As regards the power of disposition, land held as partnership stock is not subject to the rule which makes each partner the agent of the firm. Neither can sell more than his individual interest unless he have from the other a sufficient special authority for that purpose." We conclude, therefore, that without special authority from Stevenson, Coover had no power to mortgage his copartner's interest in the real estate of the firm.

This brings us to the consideration of the question whether the deposit of the instrument of revocation [*238] in the office where the *power of attorney had been recorded, constituted a complete revocation; or whether it was necessary not only to file such instrument for record, but in addition thereto, to give actual notice of the revocation to the agent and those with whom he dealt before the power was extinguished. At common law the revocation became effectual, as to the agent, from the time he received notice of it, and as to those with whom he dwelt from the time it was made known to them. "Until, therefore," says Mr. Story, in his work on Agency, section 47, "the revocation is so made known, it is inoperative. If known to the agent as against his principal, his rights are good; but as to third persons, who are ignorant of the revo-

cation, his acts bind both himself and his principal." This notice, as required by common law, it is admitted, was not given in this case, either to the agent or the plaintiffs. It is necessary, therefore, to inquire what effect the statute of this state has upon the requirements of the common law; whether the deposit for record of the instrument of revocation dispenses with all other acts and notice; or whether the registry act requires that to be done in addition to the requirements of the common law. After a careful examination of the statute, we are impelled to the conclusion that the deposit for record of the instrument is in lieu of the actual notice required by the common law, and that it dispenses with the necessity of any other notice. Sec. 24 of an act of the legislature of the territory of Nevada, entitled "An act concerning conveyances," approved November 5, 1861, declares that "every conveyance of real estate, and every instrument of writing setting forth an agreement to convey any real estate, or whereby any real estate *may be affected*, proved, acknowledged and certified in the manner prescribed in this act, to operate as notice to third persons, shall be recorded in the office of the recorder of the county in which such real estate is situated; but shall be valid and binding between the parties thereto without such record." By section 25 it is provided that "every such conveyance or instrument of writing acknowledged or proved, certified and recorded in the manner prescribed in this act, shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof; and subsequent purchasers and mortgagees shall be deemed to purchase and *take with notice." Sec. 27 of [*239] the same act makes it necessary to record all powers of attorney containing a power to convey real estate in the manner in which other instruments affecting real estate are required to be recorded; and the section following declares that "no such power of attorney or other instrument, certified and recorded in the manner prescribed in the preceding section, shall be deemed to be revoked by any act of the party by whom it was executed, until the instrument containing such revocation shall be deposited for record in

Opinion of the Court—Lewis, C. J.

the same office in which the instrument containing the power is recorded." If an instrument revoking a power of attorney to convey land is an instrument by which "real estate may be affected," the conclusion would seem to be invincible that the filing of it for record in the office where the power itself is recorded, operates as notice of its contents to all persons with whom the agent may afterward deal on behalf of his principal. This is the effect explicitly given to all such instruments by the twenty-fifth section of the act before referred to, when they have been filed for record in the proper office.

Is such instrument, then, one whereby real estate, or the title to land, may be affected? The words of the statute are as broad and comprehensive as any general words can possibly be. It will be observed, also, that they include not only those instruments which may immediately affect real estate, but likewise those whereby it may immediately produce the same result. A power of attorney to convey real estate would undoubtedly be included in the general words of section 24. It is clearly an instrument "whereby real estate may be affected." It was said in *Williams v. Birbeck et al.* (1 Hoffman's Ch. 369), that words similar to those employed in section 24 included a power of attorney to assign a mortgage. We are unable to see how an instrument which merely gives the power to sell or convey land can be considered an instrument whereby real estate may be affected, any more than the instrument of revocation, by which not only the power to sell or convey is extinguished, but even titles to land created under that power, may be utterly defeated. Under the power of attorney, real estate may be conveyed; by the instrument revoking that power, the title so conveyed may be defeated. To destroy or defeat a title to land is surely affecting real estate as much as to convey or create a title. *Until the filing of the instrument of revocation, the authority of the agent to bind his principal as to those dealing with him in good faith is undoubted. A conveyance made by the agent to a bona fide purchaser for a valuable consideration, before the revocation is deposited for record, would

ind the principal; but suppose such instrument is so deposited for record, and notice of that fact is brought to the knowledge of a person who afterwards purchases from the agent: in such case the instrument of revocation would completely defeat the conveyance to him, and continue it to the principal. Suppose A., the duly authorized agent of B., conveys land to C., after both agent and purchaser are notified that the power of attorney is revoked, but before the instrument of revocation is deposited for record, and C. conveys to D., a *bona fide* purchaser, for a valuable consideration, before the instrument is deposited, there is no doubt, we apprehend, that D. would get a good title as against the principal; but if, before the conveyance by the agent, the instrument of revocation had been filed, and notice thereof given to the agent and his grantee, in such case it is quite evident that D. would get no title whatever from his grantor. In that case, certainly, the direct effect of the instrument would be to defeat the conveyance from B. to D., and therefore it seems to us it can easily be included in the broad language of the statute as affecting the title to land, which is synonymous with real estate.

But there is further reason for the conclusion to which we have arrived. Section 28 clearly contemplates that the instrument containing the revocation shall be recorded. It declares that the power shall not be deemed revoked until such instrument is deposited for record. True, it does not in its terms require the instrument to be acknowledged, or proved and certified. But the very absence of those requirements in that section, while it requires the instrument to be recorded, shows that the framers of that act believed it to be included in the general provisions of section 24.

Again, if it is not one of those instruments mentioned in the twenty-fourth and twenty-fifth sections, and if the filing of it for record does not impart notice of its contents to third persons, why is it required to be recorded at all? The judge below concludes that the deposit for record is an act to be done in addition to those required by the common law. We think not. Unless the intention [*241] of the legislature be obvious, no statute should

operate as such notice, where is the necessity of the actual notice to third parties, required at common law?

We have endeavored to show that the instrument of revocation, *when deposited for record, imparts [*242] notice of its contents to all parties dealing with the agent after such filing for record. It is next to be determined whether the statute requires actual notice to the agent, who, it is admitted, is not chargeable with constructive notice by the filing for record of the instrument of revocation. Though the intention of the legislature is not very clearly expressed, we conclude that the revocation is complete when the instrument of revocation is filed for record, and that no actual notice to the agent is required. We are brought to the conclusion that this was the purpose of the legislature, from the fact that a certain act is required to be done before the power can be revoked; when such act is done, the conclusion is natural that the revocation was intended to be complete. Section twenty-eight of the act concerning conveyances, declares that no power of attorney recorded in the manner prescribed by law, "shall be deemed to be revoked by any act of the party by whom it was executed, until the instrument containing such revocation shall be deposited for record in the same office in which the instrument containing the power is recorded." The inevitable conclusion from this language is, that when the instrument of revocation is so filed, the revocation shall be deemed complete. This, it seems to us, is the best and safest rule to be adopted. If all persons dealing with the agent are chargeable with notice, injury can seldom, if ever, result to the agent, whilst the principal has a speedy and sure means of protecting himself from an evil-disposed servant. Should an agent convey lands after the instrument of revocation has been filed, the purchaser could have no remedy against him, because he is chargeable with notice of the fact that the agent's authority was revoked at the time of the purchase.

Again, if in addition to the filing of the instrument of revocation, the principal is required to give actual notice to his agent, he is placed in a position where he may be ruined

Points decided.

by an unscrupulous or malicious agent, who, apprehending an intention to revoke, might avoid his principal so as to defeat his purpose; or even if notice be given, he may deny it. Where the law is as doubtful as it is in this case, we think it the duty of the court to adopt that construction which will be the least likely to produce mischief, and which will afford the most complete protection to all parties, by taking away the power of committing fraud or [*243] doing injury. As all persons *dealing with the agent after the instrument of revocation has been filed for record are chargeable with notice of the fact, we can see no great necessity for notifying the agent, and there are many reasons why notice to him should not be made indispensable to the revocation of the power.

The decree of the court below, so far as it orders a sale of Stevenson's interest in the premises, must be reversed, and it is so ordered.

C. CARPENTER, RESPONDENT, v. J. C. CLARK,
APPELLANT.

[2 NEVADA, 243.]

1 SALE, DELIVERY AND CHANGE OF POSSESSION OF PERSONAL PROPERTY—STATUTE OF FRAUDS.—In construing the statutes of this state: *Held*, that to constitute a valid sale of personal property, against creditors, there must be an immediate delivery, accompanied with an actual and continuous change of possession; that the change must be actual, *bona fide*, and must continue for such a length of time as will, under the circumstances of each case, be likely to operate as a general advertisement of the sale or change of title of the property.

APPEAL from the District Court of the First Judicial District, Storey County. Hon. RICHARD RISING presiding.

The facts are stated in the opinion.

McNair & Black, for Appellant.

M. S. Harrison and Aldrich and De Long, for Respondent.

Opinion of the Court—Lewis, C. J.

*By the Court, LEWIS, C. J.:

[*244]

This action was brought to recover possession of two mules which were taken by the defendant upon a writ of attachment issued out of the district court for the county of Grey, against one E. M. House, who, it is claimed by the defendant, was the owner of the mules at the time of the attachment.

The principal facts disclosed by the record are as follows: In the month of February, A.D. 1865, the plaintiff, Carpenter, purchased the mules in question, and at the same time delivered them *to E. M. House, either [*245] on an absolute contract of sale, or an agreement to sell, but whether the sale was absolute or merely conditional does not satisfactorily appear from the evidence before us. The plaintiff, in his testimony, says: "House requested me to buy the mules for him, and said he thought he could pay me; but if he did not, he would want me to take them back." And House swears that the plaintiff bought the mules for him, and *that he was to have them if he paid for them*, and then says: "I did not pay for them, and the plaintiff took them back." It appears that House drove the animals from the time they were purchased by Carpenter until about the 1st day of April, of the same year, at which time they were returned to the plaintiff. During the months of February and March, and for a few days after the animals were returned or resold to Carpenter, they were stabled at a public stable at the expense of Carpenter. They remained at that stable a few days after the repurchase by the plaintiff, and were then taken to his own stable, where they were continually kept when not at work. After the redelivery of the mules to the plaintiff, they were worked in a team with six other animals belonging to the plaintiff and were occasionally driven by House, who, after the 1st of April, was employed by Carpenter as a driver. During the period of about eight months, from the 1st of April to the 15th of November, at which time the mules were taken by the defendants upon the attachment, House had driven them about *ninety* days. When he commenced

Opinion of the Court—Lewis, C. J.

driving for the plaintiff is not clearly shown, but it is that it was not until some time in June, which was two months or more after the redelivery to Carpenter, there appears to have been a complete and perfect change and a continuous change of possession of the animals two or three months at least, before House again took possession of them as the driver of the plaintiff.

Upon these facts it is claimed by the defendant that the sale from Carpenter to House was absolute, and that title was transferred, and that the sale back to the plaintiff was void, because there was no immediate delivery and continued change of possession, as required by section 1 of the act concerning conveyances. (Laws of 1861)

Although there is some evidence in the record to show that there was no absolute sale from Carpenter [*246] to House, we do not deem it necessary to determine upon this appeal whether it was sufficient to justify the jury in finding in favor of the plaintiff. We say, however, if it were established that the sale was conditional upon the payment, as intimated by House in his testimony, he never became the owner of the mules, and no question of redelivery from him to Carpenter could arise in this case, for the plaintiff's ownership would continue until the payment was made. But as we are of the opinion that the delivery and change of possession upon the redelivery to Carpenter were sufficient to meet the requirements of the statute of frauds, even if House were the absolute owner at that time, it is unnecessary to determine whether the plaintiff has established the fact that the sale from him to House was conditional or not.

We find no evidence in the record before us to sustain appellant in his assumption that there was an immediate delivery. As the mules were kept at Hines at the expense of the plaintiff, the only delivery that would seem necessary to make would be the surrender of possession and control of the animals. This seems to have been done. House does not appear to have driven or to have had anything to do with them, for two months after they were returned to the plaintiff. It is

Opinion of the Court—Lewis, C. J.

Also, that in a few days after the return of the mules to Carpenter, they were removed to his own stable, so that nothing was neglected which could be done to make the delivery complete. Perhaps a delay of two or three days in making delivery after the sale is otherwise complete, might not be sufficiently immediate to meet the requirements of the statute. That is a fact, however, which is to be determined by a consideration of all the circumstances of each case. In the case of *Samuels v. Gorham* (5 Cal. 226), the court say:

"To constitute a valid sale of personal property against creditors there must, according to the provisions of the statute of this state, be an immediate delivery thereof, accompanied with an actual and continuous change of possession. By an immediate delivery is not meant a delivery instant; but the character of the property sold, its situation, and all the circumstances, must be taken into consideration in determining whether there was a delivery within a reasonable time, so as to meet the requirements of the statute; and this will often be a question of fact for the jury."

*If in any other particular the sale were not complete until the animals were removed to plaintiff's stable—as if, for instance, a consideration was to be paid and no credit given, the sale would not be considered complete until the consideration was paid, and a delivery at the time of payment would be sufficient to answer the requirements of the statute. The sixty-fourth section of the act concerning conveyances only requires the delivery to be made immediate upon the sale being otherwise perfected. In this case it does not appear whether the sale from House to Carpenter was considered complete or not until after the removal of the animals to the plaintiff's own stable. But, however, that would make no difference in our conclusion in this case, for we do not think it was at all necessary for Carpenter to have removed the animals from Hines's stable, where they had always been kept at his own expense, to make the delivery complete.

But it is claimed by appellant that even if the delivery

Opinion of the Court—Lewis, C. J.

were sufficient, the change of possession was not such a continuous change as is required by the statute. We do not think this language of the act should be construed to require a change of possession for an indefinite period of time. Like all statutes, it must be interpreted by the light of common reason or necessity which induced its adoption. The evident object of the legislature was to require such a change of possession as will amount to a general advertisement of the status of the property and the claim to it by the vendee to declare such sales void where the delivery is not bona fide but merely formal, taken by the vendee to be surrendered back again. There certainly must be some period of possession of that property by the vendor would not be taken back and vitiate the sale made by him. To hold that the change of possession must continue indefinitely, would produce results so unjust and absurd that it can hardly be believed the framers of the statute had any such purpose in view. In the case of *Stevens v. Irwin* (15 Cal. 503) the supreme court of California, in discussing this question, say:

"But it never was the design of the statute to give an extension of meaning to this phrase, 'continued change of possession,' as to require, upon penalty of forfeiture of the goods, that the vendor should never have any control over them, or use of them. This construction, if it were without exception, would lead to very unjust and [*248] very absurd results. A vendor could never be a trustee of the goods without their being forfeited to him liable for his debts. * * * The continued change of possession, then, does not mean a continuance for all time in his possession or a perpetual exclusion of all use or control of the property by the original vendor. A reasonable construction must be given to this language, in analogy to the doctrine of the courts holding the general principles transferred into the statute. * * * This possession must be continuous—not taken to be surrendered back again—not merely formal, but substantial. But it need not necessarily continue indefinitely, when it is bona fide and openly taken, and kept for such a length of time as to give general advertisement

Opinion of the Court—Lewis, C. J.

it of the status of the property and the claim to it by vendee.”

It seems to us that the reasonable construction to be placed upon the statute is, that the change of possession must be actual, *bona fide*, and must continue for such a length of time as will, under the circumstances of each case, likely to operate as a general advertisement of the sale and change of title of the property. In this case there can be little doubt but that under these general rules the delivery from House to Carpenter was sufficient to meet the requirements of the statute. The mules were always kept in the public stable at the expense of the plaintiff; upon the delivery to him, on the 1st of April, he took possession and assumed complete control of them; placed them in a team with six other animals of his own; in a few days thereafter moved them to his own stable; does not seem to have employed House to drive them for two or three months afterwards; and when he did drive them, it was in connection with other animals belonging to the plaintiff, and under circumstances which would clearly show to the public the change of property from House to Carpenter; and it is shown by several witnesses that they were generally supposed to be the property of the plaintiff. Hence, we conclude that the delivery was in all respects sufficient to transfer the title to the plaintiff as against the creditors of House.

As the general views expressed in this opinion cover the questions made upon the instructions, we deem it unnecessary to give them any special consideration.

The judgment of the court below is affirmed, and it is so ordered.

Opinion of the Court—Lewis, C. J.

CARSON RIVER LUMBERING CO., RESPONDENT, v
A. BASSETT ET AL., APPELLANTS.

[2 NEVADA, 249.]

ACTION OF ASSUMPSIT—TORTS.—The general rule of law is, that that which is in its inception a tort cannot be waived so as to support an action of assumpsit.

IDEM—WHAT FACTS MUST BE SHOWN.—To enable a party to recover in assumpsit on implied promise, the plaintiff must establish such facts that a promise on the part of the defendant might reasonably be presumed from the transaction. No such promise can be presumed when the defendant commits a trespass under a claim of right.

IDEM—PLEADINGS AND PROOF MUST CORRESPOND.—A party must prove the case he makes in his pleadings, or fail; if he alleges a contract, and seeks to recover under that contract, he cannot recover on proof of a trespass.

APPEAL from a judgment of the District Court of the First Judicial District, Storey County, Hon. RICHARD RISING presiding.

The facts are stated in the opinion.

J. Cradlebaugh and B. C. Whitman, for Appellants.

Rhodes & Kirkpatrick, for Respondents.

[*250] *By the Court, LEWIS, C. J.:

On the twenty-eighth day of November, A. D. 1861, the legislature of the territory of Nevada passed an act entitled "An act for the improvement of the east branch of Carson river," by which C. H. Hobbs, J. C. Russell, David Smith, and J. L. Rennall were authorized and empowered so to improve the east branch of the Carson river from where it crosses the boundary line between California and Nevada territory to the junction of the same with its west branch, and thence the main channel to the town of Empire city in Ormsby county, by removing logs, rocks, opening sloughs, and clearing out other natural obstructions from it so as to make it suitable for the purpose of rafting down logs and timber to the town of Empire city. The second section of

Opinion of the Court—Lewis, C. J.

The act declares that "the said C. H. Hobbs, J. C. Russell, David Smith, and J. L. Rennell, or their assigns, on compliance with the provisions of the first section of this act, shall have the exclusive right to the use of said river, within the points named in said first section, for the purpose of floating down logs and timber of all kinds for the period of five years, commencing on the first day of March, A. D. 1862; at the expiration of which time said river, together with all improvements made for the navigation thereof, shall be free for and open to the people of Nevada Territory." The sixth section makes it the duty of the franchisees to construct such chutes and aprons over all dams which were erected at the time of the passage of the act *as would entirely secure them from injury, and also to construct proper booms at or near Empire city across the river, to prevent any logs or timber from floating down the stream below that point. A. W. Pray, James Wheeler, and John H. Atchison were by the seventh section appointed a board of commissioners to examine the chutes, booms, and aprons constructed by the franchisees, and when the board, or any two of them, should certify "the river to be safe to float and raft logs and timber, without damage to the dams below thereon," it should be lawful for the parties named to use the stream as in the act provided; *provided*, it should not be lawful for said parties to exercise any of the rights or franchise granted by the act until they obtained the certificate from the board of commissioners.

In the month of May, 1863, two of the commissioners, A. W. Pray and John H. Atchison, made the following report, in accordance with the requirements of the legislature: We, the undersigned, appointed a board of commissioners by section seven of an act entitled 'An act for the improvement of the east branch of Carson river,' approved November 28, 1861, respectfully report that we have examined the chutes, booms, and aprons in said river, in pursuance of the duties prescribed and imposed upon us by said act, and we do hereby certify and declare said chutes, booms, and aprons in said river to be safe to float and raft logs and tim-

Opinion of the Court—Lewis, C. J.

bers without damage to the dams below thereon, unless the said river should rise to an extraordinary height and overflow its banks."

On the twenty-fourth of February, A. D. 1863, the franchisees formed a corporation, and adopted the name "Carson River Lumbering Company."

After the plaintiff had improved the river by the construction of chutes, aprons, and booms, and the removal of obstructions from the channel, the defendants who had organized an association styled the "Carson River Wood Company," placed in and floated down the stream at different times, about eight thousand nine hundred cords of wood, and used the plaintiff's improvements, as it is claimed, in so doing. Upon these facts, the plaintiff brings an action of assumpsit to recover the sum of eight thousand nine hundred dollars, which, he alleges, is a reasonable compensation for the use of the river and the improvements [*252] placed thereon by it, and that the *defendants promised and undertook to pay that sum to it. The defendants, in their answer, deny all the material allegations of the complaint. Upon the trial, it was proven that the defendants did use the river as alleged by the plaintiff; but whether the defendants ever promised to pay for the privilege of doing so, or not, is a question not by any means settled by the testimony.

The weight of evidence is decidedly against the plaintiff, upon that point.

That is, however, a question not necessary to be determined on this appeal, as the judgment must be reversed upon an error committed by the court in refusing to give certain instructions asked by the defendants, and in giving others at the request of plaintiff. Counsel for plaintiff and the court below seem to have acted upon the assumption that it was unnecessary for plaintiff to establish a promise or undertaking by the defendant, but that the law would raise an implied promise from the use of the river and improvements by the defendants. The jury were therefore instructed that "if they believed that no special agreement existed between the plaintiff and defendant to pay the

Opinion of the Court—Lewis, C. J.

plaintiff for the use of the franchise and improvements, but believed that the defendants made use of the same in the years 1864 or 1865, or both, then they should find for the plaintiff in such sum for each year as, in their estimation from the evidence before them, would be a fair compensation for the use thereof;" and the court refused to give the following instructions asked by the defendants: "No right to charge for the use of the river or improvements is expressly granted by the acts of the legislature put in evidence by the plaintiff; no such right can be implied, and no implied contract can be raised from such use; therefore, in this form of action, the plaintiff cannot recover."

We are clearly of opinion that the judge below erred in charging the jury as stated above, and in refusing to give the foregoing instruction at the request of the defendants. It is quite evident that if the defendants used the river and plaintiff's improvements without its permission or assent, it committed a trespass; and if the plaintiff cannot waive such trespass, and sustain an action of assumpsit for the use of the river and improvements, it cannot recover in this form of action. It is assumed, in the instruction given by *the court to the jury on behalf of plaintiff, that [*253] the law would raise an implied promise from the use of the river and the plaintiff's improvements.

The old rule was, that what was a tort in its inception could not by any subsequent transaction be made the foundation of an implied assumpsit. And though this rule has in some peculiar classes of cases been relaxed, it is still the general rule. In most actions of trespass nothing could be more repugnant to the real facts than an implication of a promise on the part of the tortfeasor; and it would often be in direct conflict with his express declarations. None will claim that the law would raise an implied promise to pay rent by one who takes possession of and holds lands or tenements by force and under a claim of right in himself, nor that the law will raise an implied promise to pay a certain sum of money as damages for an assault and battery. To justify a recovery upon an implied assumpsit, it is necessary for the plaintiff to establish facts upon which a promise

Opinion of the Court—Lewis, C. J.

upon the part of the defendant to pay a certain sum of money can reasonably be presumed. But no such promise can possibly be presumed where the act constituting the cause of action is done in defiance of plaintiff's rights, or under a claim of adverse right.

This question has, however, been fully settled by the courts, and is no longer *res integra*. It has been frequently held that an action of assumpsit founded upon a tort, can only be maintained in cases where personal property is unlawfully taken and sold by the tortfeasor. In such case the owner of the property may waive the tort, affirm the sale, and have an action for money had and received for the proceeds. There is also another class of cases where assumpsit will lie to recover damages growing out of a tort, and that is where the action is brought against the executor or administrator of the wrongdoer. The courts have allowed assumpsit in this latter class of cases simply because trespass will not lie, the tort being extinguished with the death of the wrongdoer. If assumpsit were not maintainable, there would be a failure of justice. These two classes of cases are, however, the only exceptions which we have been able to find to the general rule. In the case of *Jones v. How*, 5 Pick. 285, the court say: "The plaintiff declares in assumpsit, and one count is for goods sold and [*254] delivered. *By the agreement it appears that the only ground for supporting this count is that the defendant cut and took away certain trees from land claimed by the plaintiff, and for the purpose of the argument, actually owned by him. The proper action would undoubtedly be trespass for the injury to the land, or trover for the trees. But the plaintiff contends that he has a right to waive the tort, and charge the defendant with the trees as sold to him. Upon examination of the authorities cited, which are well summed up and commented upon by Strong, J., in the opinion of the court of common pleas, we are satisfied that the plaintiff cannot maintain this position. There is no contract, express or implied, between the parties, and therefore an action *ex contractu* will not lie. The whole extent of the doctrine, as gathered from the books,

ms to be that one whose goods have been taken from him detained unlawfully, whereby he has a right to an action trespass or trover, may, if the wrongdoer *sell the goods & receive the money*, waive the tort, affirm the sale, and bring an action for money had and received for the proceeds. In such case can be shown where assumpsit, as for goods sold, in such case, except it be against the executor of the wrongdoer, the tort being extinguished by the death; and no other remedy but assumpsit against the executor remaining." So in the case of *Bennett v. Francis* (2 Bosanquet & Puller, 550), Lord Alvanly, C. J., after saying that he did not intend to give a positive opinion upon the question, used the following emphatic language:

"But thus far, I will say, that it does appear to me monstrous to carry the causes to any such extent as that which has been contended for, and that they do not warrant the conclusion which has been drawn from them. * * * I do not find that the judges in any of the cases have gone so far as to hold that a tort may be converted into a contract. * * * All that is to be collected from the cases is, that if the goods be converted into money, the court will allow the plaintiff to waive the tort, and bring an action in which he can recover nothing more than the sum actually received."

These authorities are directly opposed to the instructions given to the jury at the request of the plaintiff, for if the toll cannot be waived and assumpsit maintained, there is no implied promise arising out of the [255] wrong. We can see very readily how tolls might be recovered from a trespasser in an action of assumpsit. The law gives the right to collect them, and if the plaintiff shows a right, and that defendant had become liable to pay such toll by doing the act for which toll is authorized to be collected, the law would at once raise an implied contract or promise to pay the customary toll, and the defendant would be allowed to plead his own trespass to avoid the recovery. Upon the same principle, perhaps, stallage might be recovered. In these cases the trespass would not appear illegal. But in a case like this, to show that defendant's made

Opinion of the Court—Lewis, C. J.

use of the river and plaintiff's improvements without the permission of the plaintiff, is showing a trespass out of which no implied promise could well arise. But, say counsel for plaintiff, all forms of action are abolished by our statute, and as there is in this case a clear right, the court should not refuse a remedy. To this it is simply necessary to say, that it does not necessarily follow that because the plaintiff has a right, the court should always give a remedy, whether he uses the proper means of obtaining it or not. To entitle him to recover it is necessary, not only that there be a good cause of action, but the plaintiff must seek his remedy before the proper tribunal and under proper pleadings. It will hardly be claimed that because the forms of action have been abolished, a party must have his relief whenever he asks it, whether his pleadings be in accordance with the facts out of which the action arises or not. Counsel would hardly expect to recover on a promissory note in an action in which the complainant charges a trespass upon land or *de bonis asportatis*, nor to recover damages against a defendant for trespass in an action in which he is sued for rent upon a lease. If in such a case there is a failure to show a lease, there could be no recovery in that action, because there would be a failure to establish the fact upon which the action is founded. As in this case the plaintiff declares upon a contract, if he fails to establish it there must be an end of the action. If under such a complaint he can recover damages in trespass for infringing the plaintiff's franchise, there can be no good reason why he should not also be permitted to recover upon a promissory note under the same pleading.

We do not think such indulgence can possibly be extended to litigants under any system of practice.

[*256] *The fact that there was evidence introduced tending to sustain all the counts in the complaint, and the jury having found a general verdict, do not, it seems to us, help the plaintiff's case upon this appeal. The court, in effect, charged the jury that the use of the river and improvements would raise an implied promise to pay what such use was reasonably worth. This was not correct, and the

Opinion of Lewis, C. J., on response to petition.

esumption is that it misled the jury, and is therefore sufficient to reverse the judgment.

Though we consider it entirely unnecessary to discuss at length the question of the validity of the act of the legislature granting the franchise to the plaintiff, and the question whether the condition upon which it was granted was implied with, yet it may be well to say in brief, that we are clearly of opinion that the legislative act is valid, and that the condition was fully performed.

The judgment below must be reversed, and it is so ordered.

RESPONSE TO PETITION FOR REHEARING.

By the Court, LEWIS, C. J.:

Every point made in the petition for rehearing in this case has been thoroughly considered in our first opinion, and no authorities are cited which in any way conflict with the conclusions of the court in that opinion; and as we are fully satisfied that the law is correctly enunciated therein, we do not feel disposed to grant a rehearing of the argument. The general rule of law unquestionably is, that what is once a part cannot by any subsequent transaction be made the foundation of an implied assumpsit. There are exceptions to this rule, some of which we referred to in the original opinion, but this case does not come within any of the exceptions.

There is no doubt but the plaintiff has a right to a retrial of the issue upon the pleadings as they stand. The judgment was reversed upon an erroneous instruction given by the court below, and we can see no reason why plaintiff should not go to trial on its present complaint, if counsel are satisfied that a contract or promise on the part of the defendants can be proven. The former judgment of this court must stand, and a new trial is awarded.

BROSNAN, J., did not participate in this case.

Opinion of the Court—Lewis, C. J.

JOHN A. PAXTON ET AL., APPELLANTS, v. THE BACON
MILL & MINING CO., RESPONDENTS.

[2 NEVADA, 257.]

CORPORATION—WHEN NOT LIABLE FOR PRIOR INDEBTEDNESS OF A PORTION OF THE STOCKHOLDERS.—When a corporation is formed, the capital or corporate property of which is composed partly of the property of a pre-existing association and partly of property contributed by corporators who had no connection with the previous association, the corporation is not bound for the debts of the late association.

IDEM.—The stock of the former associates would be liable for the debts of that association, but the creditors of that association would have no claim on the corporate property, or the stock of those corporators who were not connected with the original association.

IDEM.—When there is an agreement between all the parties about to incorporate, that the corporation shall assume all the debts of the prior association; or when, after incorporation, the corporate body assumes all the debts of the old association, this would enable the creditors to maintain assumpsit against the corporation.

APPEAL from the District Court of the First Judicial District, Storey County, Hon. RICHARD RISING presiding.

The facts are stated in the opinion.

Williams & Bixler, for Appellants.

L. Aldrich and C. J. Hillyer, for Respondents.

[*258] *By the Court, LEWIS, C. J.:

Fairfax, Doake & Co., whilst proprietors of the Bacon mining ground, contracted the indebtedness upon which this action is founded, by over-drafts on the bank of the plaintiffs; the money thus obtained being used in the [*259] development and working of the *mine. After this debt was contracted, Fairfax, Doake, and their co-partners associated themselves with the proprietors of a certain quartz mill, and incorporated the property of both associations under the name of the Bacon Mill and Mining Company. By this arrangement the proprietors of the mill received an interest in the corporation equal to one-fourth of its capital stock, and the owners of the mine received the remaining three-fourths. Some time after the incorpo-

Opinion of the Court—Lewis, C. J.

tion was perfected the plaintiffs presented their account against Fairfax, Doake & Co., to the secretary and one of the trustees of the corporation for settlement; but though there was some talk or negotiating between two or three of the trustees and the plaintiffs with respect to the demand, there seems to have been no assumption of it by the defendant, nor any promise to pay it. The only persons who in any way seemed to acknowledge the plaintiffs' claim were the members of the firm of Fairfax, Doake & Co., and the testimony of those persons clearly shows that they never intended to acknowledge it as a liability of the defendant, but only that they would endeavor to get the corporation to assume it and to make some arrangements for its payment. Mr. Fairfax, one of the firm of Fairfax, Doake & Co., with whom the plaintiffs had interviews about the payment of their demand after the incorporation, in speaking of the conversation between himself and the plaintiffs upon that subject, says: "I did not represent the defendant in any of these interviews or conversations, nor was I authorized to do so." And again he says: "All I have to say here is, that as owner in the ground I was always ready to make any fair adjustment of any claim of indebtedness contracted by Mr. Doake, but that as trustee of this company I have never undertaken or attempted to adjust this claim."

Mr. Pringle, who was also a member of the copartnership of Fairfax, Doake & Co., says, with respect to the conversations which he had with the plaintiffs: "I did not act or propose to act as a trustee, because there was no meeting of the board of trustees."

The board of trustees never seem to have in any way acted upon the matter, nor is it shown that there was any agreement between the proprietors of the mine and mill, at the time of incorporation, that the corporation should assume the liabilities or be responsible for the debts of Fairfax, Doake & Co. It is, however, *claimed by [*260] counsel for appellant that such understanding or agreement was entirely unnecessary; that the liability of the defendant for those debts arises from the fact that it is the successor of the association which contracted the debt,

Opinion of the Court—Lewis, C. J.

and has received a transfer of all its property for the purpose of carrying out the object of the association of Doake & Co., and some authorities are cited to support the proposition, none of which, however, in our opinion in the remotest manner support it.

Had the mill owners all been members of the firm of Doake & Co. at the time the debt was contracted, and had they formed a corporation for the purpose of carrying out the objects of the partnership or as partners without taking in strangers, in such case the corporation would, perhaps, be primarily liable in equity for the debts of the association which it succeeded. Under such circumstances the property of no one but those who contracted the debt and were originally liable would be taken or subjected to the payment of it. The same persons continue the business, with the same property, with no substantial change except in name. In such a case there is no reason why in equity the corporation should not be primarily liable for the debts, as it has succeeded to the property of the association. But if the rule contended for by the appellants be the law, the property of a stranger to the contract of indebtedness, who may have had no knowledge of its existence, or even the means of ascertaining it, is subjected to the payment of the liabilities of the partnership with whom he may have associated himself in an enterprise or business. The injustice of such a rule is apparent that no subtlety of reason can well disguise. The general rule of law is that none are liable upon a contract except those who are parties to it, but here it is sought to charge an entire stranger to the contract with the liability of discharging it. The plaintiffs had no lien upon the mine; the formation of the corporation deprived them of their remedy or security; the interest which the mill owners received in the corporation was doubtless only equal to the value of the property which they put into it; the right of action against Fairfax, Doake & Co. continued until incorporation had taken place, and their interest in the Bacon Mill & Mining Company was as much subject to be taken to satisfy the demand of plaintiffs as the

Opinion of the Court—Lewis, C. J.

ground was before the *incorporation; hence, we see [*261] no equity to favor the rule contended for appellants' counsel. The case of an incoming partner is analogous to this, and it is universally held that he is not chargeable with the liabilities of the firm contracted before he became a member. If, instead of incorporating, the proprietors of the mill and Bacon mining ground had formed a partnership, the authorities are uniform that, without a promise by the new firm, the mill proprietors would not be holden for the debts of the old firm. (Story, Part., 152, 153.)

Why, then, should they be any more liable when, instead of a partnership, they form a corporation? There would seem to be no better reason for subjecting the interest of corporations to the payment of the debts of their associates contracted before the formation of the corporation than for holding A. liable for the payment of the debts of B., where there is no ground for doing so, except the purchase by A. of the property of B.

If it be the law that a corporation is liable for the debts of some of its members contracted in the furtherance of the common object before they associate themselves with others in the corporation, why is it not also liable for the individual liabilities of each of its members contracted in the same pursuit? We apprehend it would be rather difficult to establish any substantial reason why the rule in the one case should not prevail in the other. The rule laid down in Angell & Ames on Corp. 169, that "if an association becomes incorporated, and the corporation accepts a transfer of all the property of the association for the purpose of carrying out the object of the association, the corporation will become primarily liable in equity for the debts of the association," certainly does not apply to cases where strangers to the association unite with it in the incorporation. The members of the original association, of course, continue liable, as if no incorporation had taken place, and their interest in the corporation may be sold on execution; but that the interest of a stranger to such indebtedness can be taken to satisfy it, is a doctrine which we can never sanction as law. Unquestionably if, when the mill proprietors and mining

Points decided.

company were incorporated, there were any understanding or agreement between the respective parties that the corporation should be liable for the debts of the copartnership or association, this action could be maintained, [*262] because *that would be a sufficient assumption of the debt to make it its own. Or if, after the incorporation was complete, the corporation assumed or promised upon sufficient consideration, to pay the creditors of any of its members, in such case also the action could be maintained. But when such promise is relied on it must be clearly proven, for the presumption is against it. We conclude, therefore, that before the defendant can be held liable for the debts of Fairfax, Doake & Co., it will be absolutely necessary for the plaintiffs to show that such was the understanding between the parties at the time of incorporation, or to show such a promise as will be sufficient to bind it upon contract. Here, no such promise is shown. The conversations and promises of Pringle and Fairfax were not sufficient to charge the corporation with their liabilities.

The judgment of the court below must, therefore, be affirmed.

BROSNAN, J., did not participate in this decision.

SAMUEL READ, APPELLANT, v. DANIEL EDWARDS
ET AL., RESPONDENTS.

[2 NEVADA, 262.]

¹ STATUTE OF LIMITATIONS—ACT OF DECEMBER 19, 1862 (STAT. 1862, 68.)
CONSTRUED.—In order to avail himself of this statute a party must show that the final act, by which the execution of the instrument becomes complete, is done out of the State.

² IDEM.—*Henry v. The Confidence G. & S. M. Co.*, 1 Nev. 619, to the effect that when a debt secured by mortgage is barred by the statute, the mortgage is not thereby extinguished, affirmed.

APPEAL from the District Court of the Sixth Judicial District, Humboldt County, Hon. E. F. DUNN presiding.

The facts are stated in the opinion.

Opinion of the Court—Lewis, C. J.

Rae & Rhodes, for Appellant.

M. Clarke, for Respondent.

By the Court, LEWIS, C. J.:

[*263]

This action was brought to foreclose a mortgage executed by the defendants to secure the payment of a promissory note, bearing date at Marysville, in the state of California, March 16, A. D. 1863, and made payable one hundred dollars from the date thereof. The only defense pleaded by the defendants is the statute of limitations, and to support it the following facts are set up: that the money which the note and mortgage sued on were given [*264] advanced to the defendant Evans, at Marysville; that, so far as he was concerned, the instruments were executed there and delivered to the plaintiff, to be sent to the county of Humboldt, in the territory of Nevada, for execution by the defendant Edwards; that they were so sent to him and were executed in accordance with the understanding between Evans and the plaintiff.

The allegation of these facts is made in the answer in the following manner: "Said defendant Evans, then and there, in said city of Marysville, signed said note sued on, and executed and acknowledged said mortgage, and then and there delivered said note and mortgage to plaintiff; and that the signing and execution of said note and mortgage by defendant Edwards was afterwards done by him in the county of Humboldt, and was only the consummation (in part) of said contract of loan which had been previously entered into by said defendant Evans, for himself and defendant Edwards, in said city of Marysville, in the state of California."

Upon these facts it is claimed that the action is barred by an act of the territorial legislature, approved December 1, A. D. 1862, which declares that "an action upon any contract, obligation, or liability, for the payment of money or damages, obtained, executed, or made out of the territory, can only be commenced within six months after the time the cause of action shall accrue." If the note

Opinion of the Court—Lewis, C. J.

sued on in this case be a contract, or obligation obtained or executed out of the state or territory of Nevada, there can be no doubt that, so far as the note is concerned, the defendants' plea is good. But, in our opinion, it does not come within the statute referred to. The action is not assumpsit for money loaned in the state of California, but a suit in equity upon instruments, the execution of which was completed in the territory of Nevada. The execution of the note and mortgage was not perfected until signed by all the parties to them. Until the execution is perfected, the instrument is inchoate and imperfect. The plea of the statute of limitations is never looked upon with favor by the courts, hence a party relying upon it must clearly make out his defense. In this case, the defendants allege in their answer that the signing by Edwards at Humboldt was the consummation of the transaction left inchoate by Evans; [*265] and, in our opinion, it is necessary for the *party seeking to avail himself of this statute to show that the final act by which the execution of the instrument becomes complete, is done out of the state; a partial execution without, when the final and finishing act is done within the state, will not be sufficient. True, so far as Evans was concerned, the execution was complete in the state of California, but in no sense of the word can it be said that the *instruments* were executed before all the parties had signed them. But even if the statute was a complete defense to the note, the court below, under the ruling of this court in the case of *Henry v. The Confidence Co.* (1 Nev. 619), should have permitted a foreclosure of the mortgage.

We agree with counsel for respondent that when an appeal is taken merely from the judgment, the appellate court cannot review errors which do not appear on the judgment-roll, and in this case we have not done so. The defense disclosed by the answer being insufficient, even if established by proof, we have not deemed it necessary to look beyond the judgment-roll. The court below erred in dismissing the bill, and its judgment must be reversed.

BROSNAN, J., did not participate in this decision.

Statement of Facts.

STATE OF NEVADA, RESPONDENT, v. JESSE BONDS,
APPELLANT.

[2 NEVADA, 265.]

STATEMENT NOT CONTAINING ALL THE EVIDENCE.—This court cannot reverse a judgment for want of sufficient evidence to sustain the verdict, unless the record shows that all the material evidence is before us.

ACCIDENTAL DISCHARGE OF PISTOL.—PRESUMPTIONS.—When a party draws a pistol with the avowed intention of killing another, third parties interfere to prevent the threat being carried out; the pistol goes off, and the party threatened is killed; the natural presumption would be that the defendant had succeeded in carrying out his intention, notwithstanding the interference.

THREATS—ADMISSIBILITY AND EFFECT OF.—Evidence of threats made by defendant may be proved not only to establish the killing, but when the killing is admitted, for the purpose of establishing motive or deliberation. When a threat is made against a party, unless he will do something which he fails to do, and the threat is afterwards executed, it would seem to be as conclusive as if it had not been connected with a condition.

***APPEAL** from the District Court of the Seventh [*266]
Judicial District, Lander County, the Hon. W. H.
ATTY presiding.

The sixth instruction asked by the defendant was in these words: "A threat coupled with a condition is never regarded in law as of binding force, unless the condition be of such character as that the party threatened cannot comply with the condition; *e. g.*, if a party be threatened by another that unless he leave a certain place or house, or unless he stop coming to the party threatening's house, he will shoot him; here the party threatened may leave the place, or stop coming at the house of the party threatening, and no harm will result. A party making such threats could not be bound over to keep the peace. So in the present case. If a threat or threats were made conditionally, they are not of such binding force as if they had been made unconditionally."

The other facts appear in the opinion.

Opinion of the Court—Lewis, C. J.

Harry I. Thornton, for Appellant.

George A. Nourse, Attorney-General, for Respondent.

By the Court, LEWIS, C. J.:

The judgment in this case must be affirmed. As it is not shown that the statement contains *all* the evidence produced at the trial, we cannot say that the verdict was not justified by the proof. Unless all the material evidence introduced at the trial be brought before us, we cannot, of [*267] course, pass upon its sufficiency. To justify ^{an} appellate court in setting aside a verdict upon the ground of insufficiency of the evidence, the record which is presented to it must purport to embody all the material evidence adduced at the trial.

But it is unnecessary to rely upon that point, for we consider the evidence presented to us fully sufficient to support the verdict of the jury. The principal facts, about which there is no dispute, make a strong case against the defendant. He is shown to have entered the saloon where the deceased was killed, demanded some money which he claimed the deceased had belonging to him, and threatened to shoot him if he did not comply with his request, and, at the same time, drawing a pistol as if to execute his threat. Two persons who were present interfered to prevent violence, and, in the struggle between them and the defendant, the pistol was discharged whilst in the hands of the defendant, and the shot took effect in the breast of deceased, inflicting the mortal wound from which he soon afterwards died. These facts were sufficient to justify the conviction. If the pistol was accidentally discharged, that was a matter of defense which devolved upon defendants to establish. From the testimony, as it is presented to us, we have no reason to presume that such was the case. The defendant threatened to shoot the deceased if he did not return some money which defendant claimed; drew his weapon to execute his threat; the money was not returned. Third persons interfered, a scuffle ensued, and the deceased was shot. It is possible the pistol was discharged accidentally, but that does not

em to have been established to the satisfaction of the jury; and in the absence of proof to that effect, the most natural conclusion is, that the defendant, even in the struggle with John, succeeded in carrying out his purpose and executing a threat. Through the entire struggle he was probably exerting himself to bring his weapon to bear upon the deceased, and when he succeeded in doing so, fired. This is certainly the only rational conclusion we can arrive at from the evidence before us, and the jury undoubtedly arrived at the same conclusion. The guilt of the defendant was proven to the satisfaction of the jury, and the record does not warrant this court in holding that they should have rendered a different verdict. Hence we could not feel justified in setting aside the judgment and awarding a new trial.

*The sixth instruction asked by the defendant was [*268] properly refused. Evidence of threats employed by the defendant against a person whom he has killed, is admissible not only for the purpose of raising a presumption that the killing was done by him in cases where that fact is not clearly established by other proof, but also for the purpose of showing the deliberation or premeditation. In this case all the circumstances of the killing were detailed by eye-witnesses; hence the proof of the threat to kill was only for the purpose of establishing the intent to take life—the motive aforethought. Now, when a threat is coupled with a condition and the condition is not complied with, as in the case here, and the threat is afterwards executed, proof of it would be as conclusive of the defendant's premeditated violence as if there had been no condition. If the condition had been complied with and there was a doubt as to whether the defendant did the killing, and the threat was proven, with other circumstances to establish the fact, the condition and compliance with it might be of some weight in favor of the defendant. But in a case of this kind, the condition would seem to be of no consequence. The judgment of the court below must be affirmed, and is so ordered.

BROSNAN, J., did not participate in this decision.

Opinion of the Court—Lewis, C. J.

STATE OF NEVADA, APPELLANT, *v.* H. W. SALES,
RESPONDENT.

[2 Nevada, 268.]

ATTEMPT TO COMMIT EMBRACERY.—There is no such crime known to the law as an attempt to commit embracery. Embracery is itself but an attempt to do a wrong.

APPEAL from a decision of the District Court of the Seventh Judicial District, Hon. W. H. BEATTY presiding.

The facts are stated in the opinion.

B. P. Runkin, for Appellant.

H. Mayenbaum, for Respondent.

[*269] *By the Court, LEWIS, C. J.:

The indictment in this action charges the defendant with "the crime of an attempt to commit the crime of embracery." The facts set out in the bill to support this charge are substantially as follows:

The defendant, whilst acting as a juror in a certain civil action pending in the district court for the county of Lander, approached one of the attorneys in the cause and offered to secure and return a verdict for the defendant for the sum of one hundred dollars. There is no charge that he was corruptly influenced, or that he attempted in any way corruptly to influence his fellows. The substance of the indictment is an offer to secure a verdict for the defendant in the action for a sum of money. To this indictment the defendant put in a general demurrer, which was sustained, and the case was resubmitted to the grand jury. The only question presented to this court for determination is whether the facts detailed in the indictment constitute an indictable offense. Whilst we are inclined to the belief that the defendant might be held under a proper indictment, we do not think the bill presented to us in this record charges the defendant with any crime known to the law. Embracery is defined to be an attempt by either party, or a stranger, to

Opinion of the Court—Lewis, C. J.

upt or influence a jury, or to incline them to favor one by gifts or promises, threats or persuasions, or by ducting them in the cause, or any other way, except by ing and enforcing the evidence by counsel at trial, whether the jurors *give a verdict or not, [*270] whether the verdict be true or false. (*Gibbs v. :* ey, 5 Cow. 503; 1 Bouv. Law Dict., Embracery; Stat. 1861, Sec. 112, p. 79.) There is no such crime specially recognized, either at common law or by the statutes of this State, as that of an attempt to commit embracery. The crime itself consists of a mere attempt to do an act to accomplish a result, it is difficult to comprehend how there can be an *attempt* to commit such crime. Any attempt to corruptly influence a juror, whether it be successful or not, is itself embracery. The crime may be committed though the object of the embracer be not accomplished, and his only act consists of an attempt to carry out a corrupt purpose. If, therefore, there be any act to carry out such corrupt purpose, whether it be successful or not, such act would be sufficient to constitute the crime of embracery. Hence it would seem there can be no such specific crime as an attempt to commit embracery. In other words, there can be no indictment for an attempt to commit a crime which crime itself is but an attempt to commit a criminal act. It is a general rule of the common law that an attempt to commit a crime is itself a crime, but, in my opinion, from the very nature of the crime of embracery, there can be no attempt to commit it. However, notwithstanding the demurrer to the indictment was well taken, we have no reason why the defendant might not be indicted and punished for soliciting and inciting another to commit the crime of embracery, if it can be shown that he did so.

The common law made it an indictable offense to solicit another to commit a felony or misdemeanor. (1 Russ. Cri.

In *Rex. v. Higgins* (2 East., 5), it was held that to sit a servant to steal his master's goods was a misdemeanor, though it was not shown that the servant stole the goods, nor that any other act was done except the soliciting and inciting. In delivering his opinion in that case, Lord

Opinion of the Court—Lewis, C. J.

Kenyon says: "But it is agreed that a mere intent to commit evil is not indictable without an act done; but is there not an act done when it is charged that the defendant solicited another to commit a felony? The solicitation is an act, and the answer given at the bar is decisive that it would be sufficient to constitute an overt act of high treason."

[*271] So Le Blanc, J., *in the same case, says: "It is contended that the offense charged in the second count, of which the defendant has been convicted, is no misdemeanor, because it amounts only to a care, wish, or desire of the mind to do an illegal act. If that were so, I agree that it would not be indictable. But this is a charge of an act done, namely, an actual solicitation of a servant to rob his master, and not merely a wish or desire that he should do so. A solicitation or inciting of another, by whatever means it is attempted, is an act done, and that such an act done with a criminal intent is punishable by indictment has been clearly established by the several cases referred to." Whatever was a crime at common law is also punishable by section 151, p. 88, of the statutes of the state of Nevada, which declares that "all offenses recognized by the common law as crimes, and not herein enumerated, shall be punished in cases of felony by imprisonment in the territorial prison for a term of not less than one year nor more than five years; and in case of misdemeanors, by imprisonment in the county jail for a term not exceeding six months nor less than one, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment."

Under this view of the law, if the defendant solicited the attorney to employ money to corruptly influence the jury, he is indictable for inciting or soliciting another to commit the crime of embracery. But the indictment in this case does not sufficiently charge such an offense. The court below, therefore, ruled correctly in sustaining the demurrer, and in resubmitting the case to another grand jury.

Judgment affirmed.

JAMES D. CHAMPION, RESPONDENT, v. E. C. SESSIONS
ET AL., APPELLANTS.

[2 NEVADA, 271.]

ERRORS—MUST AFFIRMATIVELY APPEAR.—To enable this court to reverse an order of the district court, the error complained of must affirmatively appear. All presumptions are in favor of the regularity of the proceedings in the court below.

COUNTY COMMISSIONERS—INJUNCTION.—When a bill is filed restraining county commissioners from opening a road on the ground that they have not assessed the damages and provided for the payment thereof, it is error to grant a *perpetual* injunction. The commissioners [*272] should only be restrained until they have complied with the preliminary requirements of the statute.

APPEAL from the Fourth Judicial District, Washoe County, Hon. C. C. GOODWIN presiding.

This was a bill filed against the county commissioners of Washoe county, to restrain them from opening a public highway through the lands of the plaintiff. The grounds relied upon to support the injunction were, that no damages had been assessed for the use of the land dedicated to the public, and no provision made for the payment of any damages that might arise. The district court refused to grant the injunction, and dismissed the bill. The plaintiff appealed, and this court reversed that order and sent it back for further proceedings. The district court then made an order granting a *perpetual* injunction. From this the commissioners appealed.

R. M. Clarke, for Appellants.

Wallace & Flack, for Respondents.

By the Court, LEWIS, C. J.:

It is claimed by appellants that the court below erred in issuing the restraining order against the defendants without notice to them of the intention to do so. But [*273] there is nothing in the record showing that such

Opinion of the Court—Lewis, C. J.

was the fact. It appears that after the filing of the remittitur of this court in the court below the restraining order was issued ; but whether notice had been given to the defendants or not does not appear. In this respect the record shows no error. As all presumptions are in favor of the regularity of the proceedings of courts of record, error to be available on appeal must be affirmatively shown.

We cannot presume that no notice was given to the defendants that would be in direct conflict with the rule of law above referred to. If the appellants wished to take advantage of that point upon appeal, they should have prepared a statement showing that no notice was given. Here there is no statement, and the appeal is simply from the judgment. The second point made by appellants is equally unavailable upon this record. Without saying whether it was necessary for the plaintiff below to introduce proof of the facts set out in his bill before a decree could properly be entered in his favor, we may say that the record does not show whether evidence was introduced or not: hence this point is open to the same objection as the first.

There is, however, an error in the judgment which will necessitate a modification of it. The injunction granted by the court is final and perpetual, so that under no circumstances could the defendants hereafter proceed with the opening of the road in question, even if compensation should be tendered to the plaintiff for the land taken for that purpose. Such an injunction is not warranted by the pleadings or the law; for the defendants have an undoubted right to open the road by virtue of the provisions of an act entitled "An act in relation to public highways," approved March 9, A.D. 1866. (Laws of 1866, 252.) But this decree perpetually enjoins the defendants from opening the road through the premises of the plaintiff, whilst the only relief which the plaintiff's bill entitles him to is an injunction against the defendants until they have complied with certain requirements of the law above referred to. The decree must therefore be so modified as only to enjoin the defendants from opening the road in question until the probable damage which he will suffer thereby shall be

Points decided.

ascertained, and provision made for the payment thereof, as required by section 5, of the act of March 9th, '1866. When the requirements of that act are [*274] complied with, the road can be opened. But as the record brought before us shows no error but this in the judgment, we cannot reverse but only modify it as above stated.

The court below will therefore modify the decree as we have suggested. The appellants are entitled to their costs.

BROSAN, J., did not participate in this decision.

B. LOBDELL, RESPONDENT, v. D. C. SIMPSON ET AL.,
APPELLANTS.

[2 NEVADA, 274.]

WATER RIGHTS—PRIOR APPROPRIATION.—Where the right to the use of running water is based upon appropriation, and not upon an ownership in the soil, the first appropriator has the superior right.

DEM.—When a plaintiff claims water on the ground of prior appropriation: *Held*, error to refuse this instruction: "The plaintiff is not entitled to any greater quantity of the water of Desert Creek than he actually appropriated prior to defendant's appropriation."

DEM.—SUBSEQUENT APPROPRIATORS.—The first appropriator has the right to all water appropriated by him as against subsequent appropriators, and has the right to erect dams, divert water, etc., before any subsequent appropriation, but not to make any new dams or diversions of water to the damage of the subsequent appropriator, who has a right to have the water continue to flow as it flowed when he made his appropriation.

APPEAL from the District Court of the Ninth Judicial District, Esmeralda County, Hon. S. H. WRIGHT, Judge of the Second Judicial District, presiding.

The facts necessary to a full understanding of the points decided sufficiently appear in the opinion.

Altrich & De Long, for Appellant.

Quint & Hardy, for Respondents.

Opinion of the Court—Lewis, C. J.

[*276] *By the Court, LEWIS, C. J.:

“Every proprietor of lands on the banks of a river,” says Chancellor Kent, “has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run, without diminution or alteration. No proprietor has the right to use the water to the prejudice of other proprietors above or below him unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut current solebat* is the language of the law. Without the consent of the adjoining proprietors he cannot divert or diminish the quantity of the water which would otherwise descend to the proprietor below, nor throw the water back upon the proprietors above without a grant, or an uninterrupted enjoyment of twenty years, which is an evidence of it.” This is the clear and well-settled general doctrine of the common law of watercourses. The quantity of water in a natural stream could in no case be diminished to the prejudice of other proprietors, except when necessary for domestic uses, and for the watering of stock. If a reasonable use of [*277] the water for *these purposes materially diminished the quantity to the prejudice of the proprietors below, no action would lie, because these were considered privileged uses. Some of the courts have held that it might also be taken for the purpose of irrigating land, though the proprietors below were prejudiced thereby; the weight of authorities, however, would seem to be against those decisions.

Whilst every riparian proprietor has a right to the reasonable use of the water for any purpose which does not diminish its quantity or deteriorate its quality to the injury of those below him on the same stream, he has no right to use or detain it upon his own land for any purpose which would result prejudicially to any other; *sic utere tuo ut alienum non laedas* is the maxim which the courts recognize as a rule which must govern riparian proprietors in the use of running water. The anomalous condition of the settlers

Opinion of the Court—Lewis, C. J.

and miners upon the public land in California has induced the courts of that state to depart from the strict rules of the common law, and to recognize priority of appropriation as a foundation of right to the use of running water. The rule adopted in California, when viewed in the light of the necessities which induced its adoption, is founded upon the clearest principles of justice. The right to land in that state, resting as it did for years upon no other titles but that of prior occupation and appropriation, the right to the use of running water was also acquired in the same way. So the doctrine is well settled in California that as between persons claiming water, merely by the appropriation of the water itself, he has the best right who is first in time. "We presume that it is not to be doubted," says Judge Baldwin, in the case of *Ortman v. Dixon* (13 Cal. 38), "that the defendants having first appropriated the water for their mill purposes, are entitled to it, to the extent appropriated, and for those purposes to the exclusion of any subsequent appropriation of it, for the same or any other use. We hold the absolute property in such cases to pass by appropriation as it would pass by grant." So in the case of *Butte Canal and Ditch Co. v. Vaughn* (11 Cal. 152), Mr. Justice Field, in delivering the opinion of the court, says: "The first appropriator of the water of a stream passing through the public lands in this state has the right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation, and that [*278] its quality shall not be impaired so as to defeat the purpose of its appropriation."

In this action, the plaintiff seems to have relied solely upon his prior appropriation of the waters of Desert creek. No rights by virtue of his riparian proprietorship seem to have been claimed. True, in the amended complaint it is alleged that the natural channel of the stream passed through his land, and that the waters of the creek naturally flowed into and upon his premises. It is admitted, however, in the record, that he had no title in the premises, except as a mere occupant of public land, and he does not claim that thereby he is entitled to have all the waters of the creek

Opinion of the Court—Lewis, C. J.

flow in its natural channel upon his land, but simply that he is entitled to a certain quantity of water actually appropriated by him, to wit, three hundred inches. The entire complaint shows that nothing was claimed by the plaintiff by virtue of his occupancy of the land, but only by his actual appropriation of the water itself; and the prayer is that the defendants, their agents, servants, employees, and all persons having or claiming to have interests by, through or under them, be enjoined from appropriating any of the water of Desert creek, except the surplus over and above what the ditches aforesaid will convey, to wit, three hundred inches of water with a six-inch pressure, and that the court decree to the plaintiff the right to that quantity of the water of said creek. As the main issue raised by the pleadings is priority of appropriation, the court erred in refusing to instruct the jury, as requested by the defendants, that "the plaintiff is not entitled to any greater quantity of the water of Desert creek than he actually appropriated prior to the defendants' appropriation." What we might hold if the plaintiff had relied upon his rights as a riparian proprietor, and claimed the water of the creek by virtue of his ownership of the soil, it is unnecessary to say at present. We wish it understood, however, that the views expressed in this opinion are applicable only to those cases where the parties rely solely on the prior actual appropriation of water, which seems to be the case here. We do not deem it necessary to consider the question as to whether the Indian from whom the defendants claimed title could convey any right to them or not; for if the facts are correctly pleaded in the answer, and they can be established by proof, the defendants have a right to divert the water used by them independent of any right existing in or derived from the Indian. It is suggested in the sworn answer of the defendants, that the defendants claim complained of by the plaintiff, and by which they divert the water from the natural channel of the creek, existed not only when the plaintiff located upon the stream below, but when the defendants located their land above plaintiff, and that their claim had been in nowise enlarged or th

Opinion of the Court—Lewis, C. J.

dam raised since the location and appropriation by the respective parties plaintiff and defendants. The first appropriator of the water of a stream has undoubtedly a right under the decisions in California to the quantity of water actually appropriated by him as against any one subsequently appropriating any of the water of the same stream, and he has a right to remove any obstructions from the natural channel. But so soon as others locate upon the stream or appropriate the water, the first locator has no right to make any change in the channel, either to raise or lower any dams, or to close up any ditches which may have existed at the time of his own and the location of others, if others are injured thereby. In other words, a person locating upon a stream and appropriating the water has a right to have it flow (so far as the natural channel is concerned) in precisely the same manner as it did when he located; and no prior locator has any right to make any such change in the natural channel as will injure subsequent appropriators of the same water. If, as in this case, there was a dam in the stream, and a ditch conveying a certain quantity of water upon public and unoccupied land above the plaintiff at the time the plaintiff located, and he had not disturbed either, and the defendants take up the land and ditch, the plaintiff would have no right after such location by the defendants to destroy the dam or close up the ditch of defendants, if by so doing the defendants would be damaged. Neither would the defendants have any right to raise their dam or enlarge their ditch so as to deprive the plaintiff of the quantity of water appropriated by him. But they, on the other hand, have a right to claim that no dam which existed at the time of their location shall be torn down, if the tearing of it down would prejudice them.

The evidence in the case not being brought up, we are unable to determine what the rights of the defendants are; but if the facts exist as set forth in the answer, [*280] they have a right to maintain the dam as they found it at the time of their location. However, as the judgment must be reversed upon the error of the court in refusing to

 Points decided.

give the instruction above referred to, we deem it unnecessary to give the question any further consideration.
Judgment reversed and new trial ordered.

BROSNAN, J., did not participate in this decision.

SAMUEL McFARLAND, RESPONDENT, v. O. B. CULBERT ET AL., APPELLANTS.

[2 NEVADA, 280.]

¹ ACTUAL POSSESSION OF TIMBER LAND.—WHAT CONSTITUTES.—Ancient possession of timber land within boundaries clearly marked and defined possession, without any actual inclosure of such lands by fence, law only requires such possession to be taken as will make the land available and useful to the occupier.

IDEM—PRIMA FACIE LEASE.—Prior possession of land by the plaintiff ouster by defendant, makes a *prima facie* case for plaintiff, and shifts the burden of proof on defendant to show that he has some other right.

PRE-EMPTION RIGHTS—HOW ESTABLISHED.—It is not sufficient for a plaintiff to show the land is subject to pre-emption. They must show that the defendants, which establish their rights as pre-emptors. The plaintiff has the burden of proof to show his right as an occupant, the defendants, to have protected their claim, should have shown the land subject to pre-emption, and that the plaintiff is one of that class of persons entitled to pre-emption rights.

IDEM—CERTIFICATE OF REGISTER.—A certificate of the register of the county office that defendants had filed a declaratory statement in which they did not prove that they were of the class of persons entitled to pre-emption. If the declaratory statement might be received as evidence on the issue, at least that statement, or a certified copy thereof, should have been introduced.

APPEAL from the District Court of the Fourth Judicial District, Washoe County, Hon. C. C. GOODWIN presiding.

The facts are stated in the opinion.

Pitzer & Keyser, for Appellants.

Wallace & Flack, for Respondents.

(1) 1 Nev. 68; 4 Nev. 59; 5 Nev. 44; 9 Nev. 21; *Eureka M. & S. Co. v. Weg*, 11

*By the Court, LEWIS, C. J.:

[*281]

This is an action of ejectment brought by respondent to recover possession of a tract of timber land located in the county of Washoe, and containing about six hundred and forty acres. The defendants deny the plaintiff's ownership and right of possession, and two of them, Hughes and Barsey, plead ownership and right of possession in themselves, each to a quarter-section of the premises in dispute. The trial was had by a jury, and the verdict and judgment were for the plaintiff. Defendants appeal. The testimony presented by the record clearly establishes the following facts: Early in the year 1861, four persons, D. R. Wood, W. H. Loe, E. S. Simmons, and Heusted Moe, located the premises in question, felled trees around the entire tract so as to distinctly mark its boundaries, and resided upon the land thus inclosed until September, A. D. 1861, at which time they, or a majority of them, conveyed to the plaintiff, Samuel McFarland. Shortly after this conveyance to the plaintiff, he built a saw-mill and several other buildings *on the premises. As soon as the mill was [*282] completed it was employed in sawing the timber cut from the land in dispute, and the men employed at the mill, and in getting out logs, lived on the premises. The mill was kept in operation until the fall of 1865, when the plaintiff removed the machinery to Summit city, but employed a man or two to remain on the land, and they were there in November, A. D. 1865, when the defendants went on and ousted the plaintiff, and commenced cutting the timber, claiming that as the land had been surveyed by the general government, the plaintiff had no right to the possession of more than one hundred and sixty acres, whereas he was claiming and attempting to hold six hundred and forty. The two principal points made by the appellants on this appeal are: 1st. That as the plaintiff failed to prove a sufficient inclosure of the premises, the verdict was not supported by the evidence; and 2d. That as the land in controversy was surveyed by the general government and open to pre-emption, the plaintiff had no right to the possession of more than one

Opinion of the Court—Lewis, C. J.

hundred and sixty acres. Upon the first of these points we are well satisfied that the appellants are in error. The courts of this state have uniformly held that a perfect inclosure of timber land is not necessary. To build a fence that would turn stock would be an utterly useless act, and one which the courts have never required. If there be an occupation within boundaries so clearly marked and defined as to notify strangers that the land is taken up or located, it is all the possession which the courts of this state have ever deemed necessary to require. The timber land in this state is usually of no value except for the wood and timber which may be taken from it; no fence would be necessary to subject it to the complete control of a person locating it for that purpose. The land would be as useful without being inclosed by a fence as if it were, whilst arable or farming lands would not. Usually, arable or meadow land can only be subjected to the purposes for which it is most useful by such an inclosure as will turn stock. Hence, the courts have repeatedly held that such land must be inclosed by a substantial fence; but as the law never requires a vain thing to be done, the courts require nothing more than a distinct marking of the boundaries of timber land, and an actual occupation within those boundaries.* This distinction was recognized by this court in the case of [*283] *Sunkey v. *Noyes* (1 Nev. 68), and the supreme court of the territory, in the case of *Alford v. Dewing*, distinctly held that the inclosing of timber land with a substantial fence was entirely unnecessary.

In this case, the inclosure seems to have been much more perfect than usual. It is clearly shown by the testimony introduced by the plaintiff that the fence, which consisted of felled trees, brush, and stone, was continuous and unbroken around the entire claim, except upon one side, where there was an opening of some few yards, but upon that side it joined a tract which was completely inclosed with the same character of fence. Though it seems to be conceded that the fence was not sufficient to turn stock, yet it is established beyond question that it distinctly marked the boundaries of the plaintiff's claim. That character of inclosure,

together with the continuous occupation by the plaintiff, certainly constituted such a possession as would entitle him to recover in ejectment against any subsequent locator who had no title from the government.

But, say counsel for the defendants, this land is surveyed by the general government and is open to pre-emption, and the plaintiff has no right to the possession of more than one hundred and sixty acres. Priority of possession is always sufficient to support a recovery in ejectment. When, therefore, a plaintiff shows his prior possession and an ouster by the defendant, that entitles him to a recovery unless the defendant shows a superior or better right to the possession in himself. In this case, the plaintiff's possession was unquestionably earlier than that of the defendants, and therefore, unless the defendants show better rights in themselves, the plaintiff should recover. The mere fact that the land is subject to pre-emption does not necessarily entitle the defendants to possession of any of it as against the plaintiff. True, the government gives the right to pre-empt only one hundred and sixty acres to each person. It does not recognize the right of all persons even to pre-empt one hundred and sixty acres. Only those who are citizen of the United States, or who have declared their intention to become so, are twenty-one years of age, and have not pre-empted before, and who are not the owners of three hundred and twenty acres of land, have the right to pre-empt even a hundred and sixty acres of land. Should they not be citizens, or not have declared their intention to become so, *or should be under twenty- [*284] one years of age, they would have no rights whatever under the pre-emption laws of the United States. Independent of the pre-emption laws, the plaintiff's prior possession of the four hundred and sixty acres undoubtedly entitled him to recover. If then the defendants, who claim a portion of the land by subsequent settlement upon it, rely upon the pre-emption laws for protection, or for a right to the possession as against the plaintiffs, they must show affirmatively that the land is surveyed and open to pre-emption, and that they have a right to the possession by virtue of a pre-emp-

Opinion of the Court—Lewis, C. J.

tion right; that is, they should have shown that they were citizens of the United States, or had declared their intention of becoming so, and that they were over twenty-one years of age. Unless these facts be shown, how is the court to know that they have any rights whatever; that they are not mere naked trespassers upon the public land, with no possible right to pre-empt the premises from which they have ousted the plaintiff? Though the plaintiff himself have no pre-emption right, his proof of prior possession entitles him to retain the possession against all persons having no better right, and the defendants certainly could not have if they had not the right to pre-empt. The defendants introduce no proof whatever to show that they could pre-empt. There is no evidence of their citizenship, or age, and nothing to show that they had not exhausted their rights by a former pre-emption. They therefore showed no right which would overcome the plaintiff's prior possession. Had the defendants shown themselves entitled to pre-empt by proof of the necessary facts, and that the land was open to pre-emption, that might possibly have been sufficient to overcome the plaintiff's right of recovery, for the right of possession must accompany the right of pre-emption. But as that was not done, the verdict and judgment were correct. As to the charge of the judge upon the effect of the register certificate that the defendants had filed a declaratory statement in the land office, we may say, as did the judge below, that it was not evidence of title or right of possession. The declaratory statement itself was not introduced or offered in evidence, nor is there anything to show that the defendants were citizens, or that they could claim any right of pre-emption even if the declaratory statement were itself regular. The certificate of the land officers that the defendants had filed a declaratory statement amounts to nothing more than a certificate that they have declared that they were entitled to a pre-emption right upon a certain quarter section of land. Had the declaratory statement, or a certified copy of it, been introduced in evidence, it would only have proven that the defendants had taken the first step toward the pre-emp-

Points decided.

tion, without establishing any title or right of possession in themselves. In any event, if the defendants wished to derive any advantages from the filing of a declaratory statement, they should have introduced the statement itself, or a certified copy of it, so that the court below might judge of its effect. As it was, the certificate of the register of the land office amounted to nothing. As the general views which we have expressed will cover the error complained of in the instructions of the court below, it is unnecessary to give them any special consideration.

Judgment affirmed.

BROSNAN, J., did not participate in this decision.

J. B. ZABRISKIE, RESPONDENT, v. JAMES F. MEADE
ET AL., APPELLANTS.

[2 NEVADA, 285.]

EXECUTION—DATE OF JUDGMENT—RECITALS IN SHERIFF'S DEED.—One who brings an action to recover real estate purchased under execution cannot show that the execution issued under a different judgment than the one recited on its face, nor can he contradict the recitals in the deed under which he claims.

RECITALS IN DEED.—If a defendant in execution has no title to premises in question, either at the date of sale, or at any time subsequent to the period when the judgment was rendered, as appears by the recitals in the execution, in the advertisement of sale, in the certificate of sale and the sheriff's deed, a party claiming under such execution sale will not be allowed to show that the true date of the judgment under which the execution was issued was different from all those recitals.

APPEAL from the District Court of the Third Judicial District, Lyon County, Hon. W. HAYDON presiding.

The facts are stated in the opinion.

Aldrich & De Long, for Appellants.

J. Neely Johnson, for Respondent.

Opinion of the Court—Lewis, C. J.

[*286] *By the Court, LEWIS, C. J.:

The judgment in this case is clearly contrary to the evidence, and must therefore be reversed; the title proven by the plaintiff upon the trial being based upon a judgment which it appears was rendered long after the premises had been conveyed by the judgment creditor to one Rawlings, from whom the defendants claim title.

If the recitals in the execution, certificate of sale and sheriff's deed, which were introduced in evidence by the plaintiff to establish his title, be received as correct, the sheriff sold property not belonging to the judgment creditor, but which was claimed by the grantor of the defendants by virtue of a deed which had been executed and recorded nearly a year before the rendition of the judgment upon which the sale was made to the plaintiff. It appears from the record that in the month of June, A. D. 1863, one C. C. York entered into an agreement with John Rawlings, by which he agreed to sell to him the premises in dispute for the sum of three hundred dollars, payable in monthly installments of fifty dollars; that on the twenty-third day of November, A. D. 1863, York and wife, in compliance with the agreement, executed a deed of the premises to John Rawlings; and on the twenty-second day of January, A. D. 1864, the same was recorded in the office of the county recorder of Lyon county; and on the twentieth day of April, A. D. 1865, Rawlings conveyed to the defendants in this action. This is the title made out and relied on by the defendants. The plaintiff, to support his claim, introduced in evidence a judgment of the probate court of Lyon county, rendered on the sixteenth day of November, A. D. 1863, in his favor and against C. C. York, for the sum of one hundred and forty dollars and costs of suit. Upon this judgment an execution was issued on the eighteenth day of November—two days after the rendition of the judgment—by virtue of which some little personal property was seized and sold, but not sufficient to satisfy the judgment. On the twentieth day of January, A. D. 1864, an alias execution was issued and returned unsatisfied; and on the twenty-third day of Novem-

ber, A. D. 1864, an execution is issued in an action entitled *C. B. Zabriskie v. C. C. York*, by virtue of which the premises in dispute were sold to the *plaintiff in [*287] this action. The probability is that this execution was issued upon the judgment rendered on the sixteenth of November above referred to, but it recites that it is issued upon a judgment rendered on the sixteenth day of November, A. D. 1864, and it commanded the sheriff to satisfy the judgment out of the personal property of the defendant C. C. York, and if sufficient personal property could not be found, then out of the real property belonging to the defendant on the day upon which said judgment was docketed, or at any time thereafter. The sheriff certifies that on the twenty-fifth day of November, A. D. 1864, by virtue of this execution, he levied upon and sold the premises in dispute to the plaintiff C. B. Zabriskie, for the sum of two hundred and twenty-six dollars. The notice of sale also recites that the property was levied on by virtue of an execution issued upon a judgment rendered in the probate court for the county of Lyon on the sixteenth day of November, A. D. 1864. The certificate of sale also refers to a judgment rendered in November, A. D. 1864, as that under which the sale was made, and the sheriff's deed, which was executed on the thirteenth day of July, A. D. 1865, contains the following recitals:

“Whereas, by virtue of a writ of execution issued out of and under the seal of the probate court of the third judicial district of the state of Nevada, in and for the county of Lyon, tested the 23d day of November, A.D. 1864, upon a judgment recovered in said court on the 16th day of November, A.D. 1864, in favor of C. B. Zabriskie and against C. C. York, to the said sheriff directed and delivered, commanding him that of the personal property of the said judgment debtor in his bailiwick he should cause to be made certain moneys in the said writ specified; and if sufficient personal property of the said judgment debtor could not be found, that then he should cause the amount of said judgment to be made out of the lands, tenements, and real property belonging to him on the 23d day of November, A.D. 1864, or

Opinion of the Court—Lewis, C. J.

at any time afterwards;" and the deed then recites, "sufficient personal property not being found, the sheriff levied upon and sold the premises in dispute in this action to the plaintiff, C. B. Zabriskie. There seems to have been an attempt to show that the date of the rendition of the judgment, as stated in the execution, notice of sale, certificate and deed was a mistake, or to show that any of [*288] judgment than that of *November 16, A.D. 1863, was ever rendered; and yet the execution, notice of sale and deed, all refer to a judgment rendered in November, A.D. 1864, a year after the sale of the premises by York Rawlings. As the execution only authorized a levy and sale of such real property as belonged to York in November, A.D. 1864, and as the sheriff did not levy upon or sell anything else, it follows that the plaintiff got nothing at the sale, because the property sold was not the property of the defendant, nor subject to the lien of the judgment. If the sale was, therefore, wholly unauthorized, it being a sale of the property of Rawlings to satisfy a judgment against York. Whether the judgment referred to in the execution and deed be in fact the one rendered in November, A.D. 1863, or whether there was another judgment rendered a year later, we cannot determine from the recitation. In the disposition of this case, however, we must treat the recitation in the deed as conclusive that there was a judgment rendered in November, A.D. 1864, and that that the property in dispute was made to satisfy it. If there had been an attempt to correct or contradict the deed by showing that the levy and sale were made under a judgment rendered in November, A.D. 1863, it would be inadmissible in this action. The recitals in the deeds are conclusive between the party making them and those claiming under the deed. (*Donahue v. J. Cal.* 411.)

In delivering the opinion in that case, Mr. Justice says: "The officer who makes a sale and execution of land under and by virtue of a judgment, must necessarily make some reference in the authority under which he acted, and to the judicial authority. This is essential for the pur-

g a transmission of the debtor's title in the property to the purchaser and grantor thereof. This is done by recital of certain facts constitutive of the officer's authority to sell and convey, and when this is done, those who claim under the deed are estopped from denying the truth of the facts recited." So in the case of *Jackson v. Sternberg* (20 John. 40), it was held that parol evidence was inadmissible to contradict the recital, or show that the land was sold under a different judgment and execution than those recited in the deed.

The plaintiff could not, therefore, in this action, have been *permitted to contradict the sheriff's [*289] deed, upon which he relied, by showing that the sale took place under a judgment rendered at a time different from that mentioned in the deed, even if he had been anxious of doing so. But we do not see that the correction of the deed would help the plaintiff in the least, for the execution only authorized the sheriff to sell such real property of York, the judgment debtor, as he was the owner of on the 16th day of November, A.D. 1864; and the record in this case clearly shows that, long before that time, York had conveyed away the premises levied on by the sheriff, and that he had no interest in them on the 10th of November, A.D. 1864; hence the sale by the sheriff was an absolute nullity, much so as if he had levied on the property of an entire stranger to all parties to the proceedings in which that judgment was rendered. For it is now too well settled to admit of question, that a purchaser at a sale of real property under execution gets only such interest as the debtor possessed at the time of the lien of the judgment. If the judgment debtor has nothing, the purchaser gets nothing. (*Boggs v. Argrave*, 16 Cal. 559.)

In this case York, the judgment debtor, had no interest in the property on the 16th November, A.D. 1864, the time stated in the execution when judgment was rendered, and, therefore, the purchaser, Zabriskie, gets nothing by the sale.

Judgment reversed.

BROSNAN, J., did not participate in this decision.



DECISIONS
OF
THE SUPREME COURT
OF THE
STATE OF NEVADA.

OCTOBER TERM, 1866.

M. SHARON, APPELLANT, v. G. W. SHAW, RESPONDENT.

[2 NEVADA, 289.]

TRANSFER AND DELIVERY OF PERSONAL PROPERTY.—When real estate is sold, and at the same time possession of the realty is delivered by the vendor to the vendee, a bill of sale from the same vendor to the same vendee is given for the personal property in and on the real estate sold, the possession of the personal property passes with the possession of the realty; but when the same bill of sale is also of other property not on the real estate sold, there must be other and actual delivery to pass the possession as against creditors.

TRANSFER—CHANGE OF POSSESSION.—The mere request made to a servant of the vendor who has the property in actual possession, to keep it for the vendee, without any removal or change in the situation of the property, is not an actual delivery or change of possession of the property.

APPEAL from the District Court of the Third [*290] Judicial District, Lyon County, Hon. W. HAYDON presiding.

The facts are stated in the opinion.

Crittenden & Sunderland, for Appellant.

Williams & Bixler, for Respondent.

Opinion of the Court—Lewis, C. J.



By the Court, LEWIS, C. J.:

This action was brought for the purpose of recovering possession of certain personal property from the defendant, who is the sheriff of the county of Lyon, and who justifies under a writ of attachment issued out of the district court of his county. The plaintiff claiming title from Tregloan, the person against whom the attachment was issued, [*291] introduced in evidence a bill of sale from him of *all the personal property now in controversy, dated October 31, A.D. 1865, and also a deed bearing date June 1, A.D. 1865, by which certain real estate (upon which a portion of the personal property was situated) was conveyed to the plaintiff.

It was also proven at the trial that a large portion of the personal property was kept in the cellar of the boarding-house, which, it appears, was not located on the premises conveyed by the deed of June 1st. This deed, though executed on the first of June, was not placed on record until the night of the thirty-first day of October, when the bill of sale was executed.

The plaintiff, Mr. Sharon, gives as a reason for this delay, that the deed was delivered to him with the understanding that at any time when he might consider the bank, for which he was acting, not entirely secure, the deed might be placed upon record. On the thirty-first day of October, the grantor, Mr. Tregloan, informed the plaintiff that he did not think he could discharge his indebtedness to the bank, and offered to surrender all his property in discharge of it; this offer was accepted, the bill of sale executed in compliance with this understanding, and the same evening the deed of the real estate was placed upon record. The deed conveyed the premises upon which the Swansea mill is located, together with the mill, batteries, engines, boilers, pans, and all other machinery belonging or appertaining thereto. It appears that there was a boarding-house owned and conducted by Tregloan in connection with this mill, but not located on the premises conveyed by the deed. Much of the personal property transferred by bill of sale, was

pt in the cellar of this boarding-house; the balance was
pt on the premises conveyed by the deed.

On the morning after the execution of the bill of sale and
e recordation of the deed, the plaintiff, by his agent, took
ssession of the premises. The agent also informed the
ersons who were employed at the boarding-house of the
le, and engaged them on behalf of the plaintiff to remain
his employ.

Tregloan delivered a bunch of keys to Johns, the plaintiff's
agent, among which was the key to a building occupied
the office; but it appears that the key to the cellar of the
arding-house, where much of the property in question
s kept, was not delivered with the others, it being
the possession of Mrs. Washburn, *who was em- [*292]
yed to take charge of the cooking for the
mployees of the mill. Nothing was done towards tak-
g possession of the personal property in the boarding-
use cellar, except that Johns informed Mrs. Wash-
rn of the sale, and requested her to remain as the
mployee of the plaintiff. On the morning of Novem-
r 1st, after the delivery of possession of the premises,
sheriff levied upon the personal property in question, a
ction of which was in the office, some of it in the mill,
l, as before stated, much of it in the cellar of the board-
-house. Upon the trial, the defendant claimed that there
l been no such delivery of the possession of the property
would transfer the title to the plaintiff, as against the
ditors of Tregloan. The verdict and judgment were for
defendant. Plaintiff appeals. The principal question
sented for consideration in this court is, whether the
ivery of the personal property by Tregloan to the plaintiff
as sufficient to meet the requirements of the statute of
ds? Our conclusion is, that the delivery of that por-
n of the property transferred by the bill of sale which
in the mill and office or on the premises conveyed by
deed, fully met the requirements of the law. The bill
ale passed the right of possession, and the deed and the
sequent surrender of the possession of the real estate
n which the personal property was kept, was a com-
Nev. Dec.—51

Opinion of the Court—Lewis, C. J.

plete delivery of the possession of that personal property. We are unable to see what further delivery or change of possession could have taken place. The plaintiff having received a conveyance of the real estate whereon all the personal property was needed for use, it would be a harsh construction of the law to hold that a complete delivery could not take place without a removal of it from the place where it had been kept by the vendor of the plaintiff. There was not only a transfer of the right of possession by means of the deed and bill of sale, but the plaintiff's vendor surrendered possession of everything about the premises, and delivered the keys to the agent of Mr. Sharon. Thus, the title and the possession were passed, and the deed which was placed upon record before the levy by the sheriff imparted notice to the world that the premises upon which the personal property was kept had been conveyed to the plaintiff. This, together with the actual possession of the premises by the plaintiff, would be sufficient to notify [*293] third parties of the transfer. There was not only the sale of the personal property and a delivery of the possession, but there were all the outward evidences of such sale which the circumstances of the case admitted of. The conveyance and delivery of the possession of the real estate and the recording of the deed operated precisely the same as a removal of the personal property from the premises entirely.

In our opinion, it is a matter of no consequence in the decision of this question whether the deed from Tregloan to Sharon would in equity be considered a mortgage. The deed is absolute on its face, and a delivery of possession of the real estate took place under it. Whether that possession was obtained by virtue of a deed absolute, mortgage or lease, the result here must be the same.

As to the property kept in the cellar of the boarding-house, there seems to have been no such delivery and change of possession as the law contemplates. That portion of the property was not on the premises conveyed by the deed, and the key to the cellar where it was kept was not delivered with the others, but remained in the possession

the servant until it was taken from her by the sheriff. The boarding-house not being included in the deed of conveyance, of course continued to be the property of Tregenna. The servant which he had employed before the sale, continued in possession of the house and the personal property in the cellar. There was no change, or apparent change of the possession of that portion of the personal property. Everything remained the same after as before the sale, and the fact that that house had not been conveyed by the deed, would of itself raise the presumption that no change had taken place as to it, or the property in

As to that portion of the property, nothing was done towards a change of possession, except the notification of the servant who had charge of it, that it had been sold, and the employment of her in the same capacity by the plaintiff. The authorities are uniform that that would not be such a delivery and change of possession as is required by the statute. So it was held by this court in the case of *Doake v. Hubaker* (1 Nev. 218) and by the supreme court of California in the case of *Hurlburt v. Bogardus* (10 Cal. 519).

The transcript does not purport to contain all the evidence adduced at the trial, but from that which [*294] is presented it is shown affirmatively that there was not a sufficient delivery of that portion of the property which was in the boarding-house at the time of the levy by the sheriff, to transfer the title to the plaintiff.

So far as the question of fraud in the conveyance and sale to the plaintiff is concerned, we find nothing in the record which would in any manner justify the jury in arriving at the conclusion that any existed.

The judgment must therefore be reversed, and a new trial ordered.

BROSNAN, J., did not participate in this decision.

Opinion of the Court—Beatty, J.

J. T. LOCKHART, APPELLANT, v. THOMAS MACKIE,
RESPONDENT.

[2 NEVADA, 294.]

DEPOSITIONS—INFORMALITIES IN CERTIFICATE OF OFFICER.—Depositions will not be rejected for informality in the certificate of the officer before whom they are taken, when it appears that both parties were present, and the witnesses were cross-examined.

IDEM—STIPULATION.—A stipulation of the parties to a suit may dispense with any certificate by the officer taking depositions.

OBJECTIONS MUST BE MADE IN LOWER COURT.—It is too late to raise the objection in this court for the first time that there was no proof of the absence of the witnesses whose depositions were read.

FINDINGS OF COURT UNSUPPORTED BY EVIDENCE.—When a case is tried before a court without a jury, and one of the facts found by the judge, and the very one on which the case, in his opinion, turns, is wholly unsupported by the evidence, this court will not treat this particular finding as surplusage, in order to sustain the judgment on other findings, but will reverse the judgment.

APPEAL from a judgment of the District Court of the Fourth Judicial District, Hon. R. S. MESICK presiding.

The facts are stated in the opinion.

Thomas Fitch and C. N. Harris, for Appellant.

Clarke & Flack, for Respondents.

[*295] *By the Court, BEATTY, J.:

This was an action brought for an ox team, wagon, etc. The wagon and a part of the cattle belonged to one Stockham in the year 1864, and both parties found their claim to the property on the title derived from Stockham. The plaintiff claiming that Stockham sold to J. S. Bostwick, and Bostwick to plaintiff. The defendant's theory is that Stockham sold to Symington, and Symington to defendant.

The case was tried before the judge without a jury, who found for the defendant, and the plaintiff appeals.

The plaintiff makes but two points in this court: one, that certain depositions were improperly admitted in evidence, and the other that the findings of fact are not supported by the testimony.

The objections made to two of the depositions below was, that the certificate of the clerk before whom they were taken did not certify that they were *carefully* read to witnesses after being written out, and further failed to certify that the witnesses *did not wish to correct them after they were read*.

These objections, we think, are too technical, when it is shown, as in this case, that counsel on each side were present, and participated in the examination and cross-examination of the witnesses. Such an objection would certainly be entitled to grave consideration in a case where there were no cross-examination and no one present representing the opposing party.

The stipulation attached to the third deposition dispensed with all necessity of a certificate of any kind. A stipulation of the parties may certainly supply the place of a certificate of the officer.

It is further objected in this court that the record shows no proof that the witnesses, whose depositions were read, were not, at the *time of trial within the jurisdiction of the court, and capable of being brought to court to testify orally. That objection comes too late, being taken for the first time in this court.

Had it been raised in the court below, possibly the absence of the witnesses might have been shown so as to admit the depositions. The failure to raise the question there amounts to a waiver of that point, or an admission that the necessary preliminary proof could have been made.

Upon the other point, we think the appellant's position must be sustained. Plaintiff proved by Stockham that he had sold the cattle to Bostwick on the 20th of August, 1864; that Bostwick was a merchant to whom he was indebted, and that he was to be credited by Bostwick on his book with the price of the cattle, to wit, six hundred dollars; that he never made any sale or contract in regard to the cattle with Symington. Bostwick confirms this statement, so far as his purchase is concerned, and further states that, after making the contract with Stockham for the cattle, he employed Symington to drive the team for him, and sent him to the pasture where the cattle were kept to get them. Here is the direct

Opinion of the Court—Beatty, J.

and positive evidence of two witnesses to the fact that the sale was made to Bostwick on the 20th of *August*, a date which, we will see hereafter, becomes somewhat important. Also the testimony of one witness, Bostwick, that within a day or so after his contract of purchase, he sent his employee, Symington, to get the cattle for him.

On the other hand, the defendant proves, by Symington, that he (Symington) bought the same team of Stockham on the 28th or 29th of July, and that he drove the team from that time (July 28th or 29th) as his own team, and never hired to Bostwick to drive his team.

Here there are two distinct theories, and a flat contradiction between the two. The question is, whether Stockham and Bostwick perjured themselves, or whether Symington was the guilty party. It cannot be questioned that one side or the other committed perjury.

Symington showed, on his examination, that he was totally unworthy of belief. There are some contradictions and discrepancies in his statements calculated to throw suspicion on his testimony. But the remarkable feature is, that he describes with particularity *a certain order that he wrote; declares positively when questioned that he himself wrote it; yet on the trial it was shown that he could not write (except to sign his name); beyond that he could not write a word. On the other side, there was an attempt to impeach the credibility of Bostwick by direct testimony as to his general character. The judge below thinks this attempt was a failure. We certainly think that the weight of the testimony was in favor of Bostwick. He seems to have been somewhat engaged in the lumber business, and the wood-choppers and lumbermen generally spoke harshly of him. Frequently, a man by a rigid enforcement of his rights, by a pertinacious stickling for small things which are, in fact, perfectly right, will as effectually incur the displeasure of laborers as by actual dishonesty. On the other hand, the merchants and business men of the town where Bostwick lived gave him an excellent character.

We think, so far, Bostwick must stand unimpeached. There was no direct attack on Stockham, and his testimony
* to be straightforward and consistent.

Opinion of the Court—Beatty, J.

So far as those three principal witnesses are concerned, all the evidence entitled to any weight is on one side. The only other testimony of any consequence is the detail of conversations held with Symington, with Bostwick and with Stockham. In other words, the admissions of witnesses of the existence of a state of facts different from those sworn to on the trial.

A. J. McCreery says that he asked Symington who the cattle belonged to, and he replied that they were his when he paid for them—that Bostwick held them. John Bostwick, brother of J. S. Bostwick, swears Symington applied to him for money to pay bill due on team; stating he was driving for J. S. Bostwick; that the team belonged to J. S. Bostwick.

J. S. Weston proves that he was present when Symington was about to start to Winnemucca Valley for the team; that Bostwick gave him money, and directed his clerk, Parker, to give Symington an order for the team.

There is also much testimony to show that J. S. Bostwick paid all the bills for keeping cattle, etc.

On the other hand, there are a number of witnesses called to prove statements made by J. S. [*298] Bostwick and Stockham inconsistent with their sworn evidence.

One J. Davies testifies that J. S. Bostwick once said to him he had better have done as Symington did, and then he could have work. Davies replied, if he would buy a team and haul for Bostwick, Bostwick would soon own both him (Davies) and the team. Bostwick made no reply to this.

One Suther swears that Stockham, in August, 1864, informed him he had sold the team to Symington. But this Suther is shown to have been willing to sell himself to either side as a witness, and clearly his evidence was not entitled to any weight.

One Spiglehoff, who keeps a tavern on the road where the team was driven, learned in August, 1864, that the team was sold—thinks he learned from Stockham it was sold to Symington, and commenced charging the bills to Symington about the 1st of August; but within the month, by direction of Bostwick, charged bills to him (Bostwick).

Opinion of the Court—Beatty, J.

One Montgomery swore he heard Stockham say Symington had bought a team, or got a team from him.

Peter Robinson swears he took an order from Symington, who owed him, to J. S. Bostwick. Bostwick refused to accept or pay the order, and said Symington owed him still for the cattle he bought for him; that he had to buy cattle for Symington to replace those that died, and that Symington had not paid him for them yet.

This was all the important testimony tending to shake the credibility of the witnesses J. S. Bostwick and Stockham, except the deposition of Tartan Smith, which we will hereafter mention. This kind of evidence is the weakest of all kinds of evidence, because it is more easily manufactured than any other kind, and if manufactured, more difficult to rebut. It is also liable to the objection that even honest and correct witnesses are always liable to misunderstand and incorrectly report mere casual conversations in which they have no particular interest. Symington, too, made admissions just as inconsistent with his testimony as those made by Bostwick and Stockham, if all the witnesses are to be believed.

Then there is the deposition of one Tartan Smith, which fixes particularly the date that Symington came to a pasture in his charge where the oxen were pastured, and [*209] claimed that he had at that *time bought the cattle from Stockham. This, he says, was on or about the 22d of August (the time Bostwick says he sent Symington for his cattle).

The next day after Symington came and got the cattle, Stockham came and said he had sold them to Symington, and from that time forward the bills for pasturing them were to be charged to Symington.

He then went down to Bostwick's, and Bostwick told him to keep Symington's cattle, that Symington was hauling for him, and he would pay the bills weekly; and when at the end of the week the bill was presented to Bostwick, he, Bostwick, paid the bill and informed witness he had nothing to do with the cattle, except that he wished to keep Symington along.

This deposition certainly makes out a complete case for Symington, if it is to be believed. But certainly the very completeness of the deposition, the fact that it covers every point in the case so entirely, casts some suspicion on the testimony. But there is a stronger objection to it. The whole deposition taken together fixes the date of Symington's purchase between the twentieth and twenty-fifth of August, a date corresponding with the alleged purchase of Bostwick, and nearly a month after his alleged purchase, which, by his own showing, was the twenty-eighth or twenty-ninth of July.

It looks as if, when this deposition was given, Symington's intention was to claim the purchase as having been made by him at the time he took the cattle from Winters's pasture, about the twentieth or twenty-second of August. But at the trial, for some reason or other, he changes his base, and claims to have bought them in July. If Smith's testimony impeaches the statements of Bostwick and Stockham, it equally impeaches the testimony of Symington. Taking the whole testimony together, the case is involved in much doubt, with an apparent decided preponderance of testimony in favor of plaintiff, who derives title from Bostwick. If there had been a general verdict of a jury the other way, and the court below had approved that verdict, this court would not probably have felt authorized to interfere. In this case, however, there was no jury, the case having been submitted to the court by stipulation without a jury. The judge who tried it wrote a long and [*300] opinion reviewing the testimony, with most facts of which we fully concur. He also filed a special finding of facts. One of those findings, and the one which forms the foundation of defendant's right to a judgment, is as follows:

'First. In the month of August, A. D. 1864, one Stockham was possessed of an ox team as his own property, composed of eight oxen, together with the wagon, yokes, chains, &c., mentioned in the complaint, and whilst so possessed, he sold and delivered the same to Jacob Symington for the price of six hundred dollars, of which price the sum of *thirty-four dollars and forty cents* was immediately paid,

Opinion of the Court—Beatty, J.

and the balance to be paid in service with the team, a portion, if not all, of which service was subsequently rendered; but no bill of sale was given, the plaintiff [meaning Stockham] reserving the legal title in himself until the price of the team should be paid."

There is absolutely no testimony in the case supporting the latter part of this finding. Symington does not assert a conditional sale to himself in August, but an absolute sale in July. Tartan Smith's testimony, as it regards the declarations of Symington, of Stockham, and of Bostwick, refers only to an absolute sale.

The only language in all the testimony which could be tortured into a reference to a conditional sale, is that of A. J. McCreery, who testified that "Symington said they were his when he paid for them; that Bostwick held them." This language would indicate that Symington claimed some sort of contract for the purchase of cattle from Bostwick; not that he had bought them from Stockham either conditionally or absolutely.

But this does not amount to sufficient testimony to justify any finding. It is a mere declaration of Symington in his own favor, which he afterwards contradicts under oath. It may, however, be said that the latter part of this finding is mere surplusage. That you may strike out all that part which refers to the reservation of title by Stockham, and it is then a good finding to support a judgment in favor of defendant. If the latter portion of the finding were stricken out, it is undoubtedly true that it would then be a good finding to support the judgment.

But the latter portion is a material part of the finding, and we do not think it can be thus summarily disposed of. We are not sure that the judge who found a conditional sale would have been willing to find an absolute sale.

The learned judge of the court below admits that he was impressed throughout the trial with the improbability that Stockham would have sold his team to an irresponsible man like Symington, but got rid of this idea when he became possessed of the idea of a conditional sale, and Stockham's using the title in himself until the team was paid for.

Opinion of Lewis, C. J., concurring.

If, then, he had not arrived at the conclusion that there was a *conditional sale* (and we think he had no testimony before him to arrive at such a conclusion) he would most probably have determined that the weight of testimony as to a positive sale was in favor of plaintiff.

Again, if there was a conditional sale, there is a total absence of testimony showing the exact conditions thereof. If there were conditions precedent to be performed by Symington before the title vested in him, he should have shown these conditions performed. If he was not to have title or *absolute* right of possession until he had paid for the team, it appears to us he totally fails to make a case.

He shows, taking his testimony for truth, that he had the cattle about one hundred and ninety or one hundred and ninety-five days; that his hauling for Bostwick amounted to a fraction less than one thousand one hundred dollars. From this was to be deducted all the expenses of himself and cattle, repairs to wagon, the purchase of four oxen to replace those that died, etc. One ox is stated to have cost fifty dollars; if the others cost the same, here is an item of two hundred dollars. The cattle seem to have cost for pasturage, two dollars per night, and not less than three hundred and eighty for the whole period. Besides this, hay was bought for feeding most of the time. Toll and tavern bills on the road were to be paid; shoeing cattle, repairing wagon, and the personal expenses of Symington, all come out of this one thousand one hundred dollars. The probability is that all these expenses fell little short, if they did not exceed, one thousand one hundred dollars.

It appears to us the first finding of fact is not sustained by the testimony, and the ends of justice require a new trial should be had.

*Judgment is reversed and a new trial ordered. [*302]

LEWIS, C. J., concurring:

I concur in the reversal of the judgment, upon the ground that the first finding of the court was not warranted by the evidence.

BROSNAN, J., did not participate in this decision.

Opinion of the Court—Beatty, J.

H. MACKIE ET AL., APPELLANTS, v. J. V. A. LANSING,
RESPONDENT.

[2 NEVADA, 302.]

¹ STATUTE OF LIMITATIONS—NOTE AND MORTGAGE.—A party holding a mortgage is not barred of his right to foreclose the same until four years shall have elapsed from the accruing of the action, although the statute may have barred an action at law on the debt before that time.

IDEM.—A party taking a second mortgage during the period intervening between the time when the statute bars the action at law, and when it bars the proceeding to foreclose, holds his lien subject to the first mortgage.

APPEAL from the District Court of the First Judicial District, Storey County, Hon. C. BURBANK presiding.

The facts are stated in the opinion.

Campbell & Seeley, for Appellants.

Williams & Bidler, for Respondent.

By the Court, BEATTY, J.:

This was a suit brought on a note executed in the state of Nevada in the year 1862, secured by mortgage on real estate situated in this state (then territory). The note, after it became due and was barred by the statute of limitations of the then territory of Nevada, was renewed by a special promise in writing. But before this renewal, another and intervening mortgage had been executed by the defendant to a third party.

The court below held that the plaintiff's note having been barred at one time by the statute of limitations, the security was gone, and the second mortgage took precedence.

This was an error: although the plaintiff's right to sue on the note itself may have been barred at one time, [*306] his right to foreclose the *mortgage is not barred until the lapse of four years. (*Henry v. Confidence* (N., 1 Nev. 619.) That time had not elapsed when this suit was brought. According to the finding of facts in the

Opinion of the Court—Lewis, C. J.

court below, appellants were entitled to a precedence of lien on the undivided half of the property described in the complaint to secure their debt.

The judgment of the court below is reversed, and the court will enter up a decree in accordance with this opinion.

BROSNAN, J., did not participate in this decision.

MOSES WICK, RESPONDENT, v. W. T. O'NEALE, ADM'R,
APPELLANT.

[2 NEVADA, 303.]

STATUTE OF LIMITATIONS—ESTATES OF DECEASED PERSONS.—When a party dies owing a debt not barred by the statute of limitations at his death, the holder of the claim has one year after administration granted on the debtor's estate within which to bring his action, although the action would have been barred in less than one year, if the debtor had lived; if, however, the claim is presented to the administrator and rejected, suit must be brought thereon within three months after rejection.

DECI.—The statute giving one year after administration granted applies to all classes of cases.

APPEAL from the District Court of the First Judicial District, Storey County, Hon. R. S. MESICK presiding.

The facts are stated in the opinion.

Mitchell & Hundley, for Appellant.

McRae & Rhodes, for Respondent.

By the Court, LEWIS, C. J.:

This action is brought upon a promissory note executed by one W. O. Middleton, at Oroville, in the state of California, on the eleventh day of June, A. D. 1864, by which he obligates himself to pay the sum of five hundred dollars to the plaintiff in thirty days from the time of its execution.

By the findings of fact set out in the record it appears that, on *the ninth day of October, nearly [*304] three months after the maturity of the note, the maker, Middleton, died; that, on the fourteenth day of November following, the defendant was duly appointed admin-

Opinion of the Court—Lewis, C. J.

istrator of the deceased's estate; and on the eleventh day of July, A. D. 1865, about five months after this appointment, the note was regularly presented for allowance as a claim against Middleton's estate, and rejected by the administrator; and within two months thereafter this action was brought, and judgment entered in favor of the plaintiff. The only defense relied on by the defendant is based upon the thirty-fourth section of the statute of limitations of this state, which declares that "an action upon any judgment, contract, obligation, or liability for the payment of money or damages obtained, executed, or made out of this territory, can only be commenced within six months from the time the cause of action shall accrue." (Stat. 1862, 82.)

This is an amendment of section thirty-four of the general statute of limitations, and the defendant claims that under it the note in question is barred, and hence that no action can be maintained upon it. There is, however, another section of the statute which clearly excepts from the operations of this section all cases where the debtor dies before the statute has fully run. It provides that "if a person, against whom an action may be brought, die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his executors and administrators after the expiration of that time, and within one year after the issuing of letters testamentary or of administration." (Sec. 23, p. 30, Stat. 1861.)

This section beyond all doubt extends the time for the commencement of actions to one year from the time of the issuing of letters testamentary, in all cases where the person against whom the action may be brought dies before the statute has fully run.

In this case, the maker of the note died before the statute had run, and the action was brought in less than one year after the defendant had been appointed administrator: hence it clearly comes within section twenty-three, above referred to. This section must, however, be construed in connection with section 186 of the probate act, which makes it the duty of any person whose claim against an estate is rejected, to

ing his action against the executor or *adminis- [*305]
ator within three months after such rejection, if it
is then due; and if not, then within three months after it
becomes due.

Though the creditor of the estate has one year from the
time letters testamentary are issued within which to com-
mence his action, it is always with the qualification that it
be commenced within three months after the claim upon
which it is based is rejected by the executor or adminis-
trator. Thus the holder of the claim has one year after the
appointment of the executor or administrator within which
to bring his action, unless he voluntarily shortens that time
by presenting his demand at a period more than three
months before the expiration of the year. To illustrate:
the plaintiff in this case could, if he chose, have deferred
the presentation of the note upon which the action is
brought for nine months after letters were issued to the de-
fendant, and he could then have delayed three months after
rejection before bringing suit; thus he would have a
year after the appointment of the defendant within which
to bring his action, or he could have shortened that time by
presenting his claim immediately upon the issuance of let-
ters, and thereby made it necessary for him to institute his
action within three months after the appointment of the de-
fendant.

But it is claimed by counsel for appellant that the twenty-
third section of the statute of limitations, referred to above,
does not apply to that class of actions referred to in the
amended section thirty-four.

Why it should not, we are utterly unable to see. Section
thirty-four, as amended in the year 1862, becomes a part of
the general statute of limitations, and section twenty-three
nearly applies to all actions referred to in the act. If it
were the intention of the legislature to except all actions
accruing out of the state from the operation of section
twenty-three, such an exception should have been incorpo-
rated in some part of the law. That has not been done.
We therefore hold that it applies to all actions, irrespective
of where they may accrue.

The judgment of the court below must be affirmed.

Opinion of the Court--Beatty, J.

CYNTHIA A. WILDE, RESPONDENT, v. JONATHAN S.
WILDE, APPELLANT.

[2 NEVADA, 306.]

DUE NOTICE—MEANS WRITTEN NOTICE OF FIVE DAYS.—When the statute says an order may be made on due notice to the opposite side, it means the statutory written notice of five days.

ALIMONY PENDENTE LITE—NOT ALLOWED AFTER FINAL JUDGMENT AGAINST THE APPLICANT.—Under the statute providing for the payment of alimony *pendente lite*, the court cannot make an order for the payment of past expenses after the suit has been finally decided against the wife.

JURISDICTION IN EQUITY CASES.—The supreme court has jurisdiction in all equity cases, whatever may be the amount in controversy.

APPEAL from the District Court of the Second Judicial District, Ormsby County, Hon. S. H. WRIGHT presiding.

The facts are stated in the opinion.

Geo. A. Nourse, Attorney-General, for Appellant.

Clayton & Clarke, for Respondent.

By the Court, BEATTY, J.:

In this case, a bill seeking a decree of divorce from her husband was filed by the plaintiff in the month of April. In the early part of May an answer was filed. On the 13th day of May, the cause was set for trial on the 8th day of June.

On the 4th day of June, the plaintiff's attorney gave notice that on the 8th (the same day the case had been set for trial) he would move the court for an allowance to be made the plaintiff out of her husband's estate by way of alimony *pendente lite*, and to enable her to prosecute the suit. This motion was called up at the meeting of court on the morning of the 8th, and defendant objected to the motion being then heard, because he had not had five days' notice thereof, and had not been served with a copy of the affidavit on which the motion was based.

The court took the motion under advisement, and directed the plaintiff to serve on defendant a memorandum of amounts

claimed for the prosecution of suit, for support *pendente lite*, &c.

In the meantime, the trial proceeded, and no further steps were taken with the motion (unless it was the furnishing to defendant *the memorandum of accounts claimed, which the court had directed) until the trial terminated in a judgment for the defendant. The statute says an order for alimony in cases of this sort may be made on "due notice." We think *due notice* means such notice as is prescribed for all motions in the general practice act; that is, a written notice of five days, when both parties reside in the district where the motion is to be made, as in this case.

As only four days' notice was given, we think the court could not properly have heard and determined the motion at the time it was called up, on the morning of the eighth of June, unless by consent of defendant. As this consent was not given, we think the motion was properly laid over.

In the meantime the case came on for trial, and that trial having resulted in a judgment for defendant, we are of opinion that after judgment the court could not proceed to determine the motion.

Alimony is granted to a wife applying for a divorce *pendente lite*, because having made a *prima facie* case by her ill, she is entitled to the means of establishing that case at trial if it can be done.

Usually a case cannot be brought to trial without money. Therefore the law has provided in the case of married women, whose property is generally entirely under the control of the husband, that he shall furnish her out of the common property with sufficient means to carry on the suit and determine whether she is entitled to the relief sought in her bill. If this were not done, there might be a total failure of justice, for a tyrannical husband might abuse his wife to any extent and protect himself from the consequences the law visits on such conduct, by denying her the means of asserting her rights in a court of justice. But if it could be known beforehand that the wife had no just cause of action, the law would not compel the husband to

Points decided.

pay the costs of a groundless suit brought against himself. So after it has been determined by the judgment of the court that it was a groundless action, it would not be proper to make an order for past costs and expenses of such action. Paying the costs after the suit was over and decided could not alter the judgment.

In a proper case, where there was a motion for a new trial pending, or even an appeal pending, the court below might, in its discretion, allow alimony to enable the [*308] wife to prosecute the case to *final hearing. But when the controversy is entirely ended by a judgment for the husband, who is defendant, it is an error to make an order for past costs and expenses. (Secs. 416, 417, Bishop Mar. & Div.)

It is urged that this court has no jurisdiction in this case because the amount ordered to be paid is less than three hundred dollars. This court has jurisdiction in all chancery cases, whatever may be the amount in controversy. This comes within the jurisdiction of this court. The order complained of was made after judgment, and is therefore an appealable order under the statute.

The order directing the defendant Jonathan L. Wilde to pay one hundred and ninety-three dollars and seventy-five cents into court is hereby reversed and set aside, and the court below will make an order to that effect in its minutes.

BROSNAN, J., did not participate in this decision.

W. M. SEAWELL, RESPONDENT, v. D. COHN, APPELLANT.

[2 NEVADA, 308.]

STIPULATION TO EXTEND TIME—EFFECT OF.—Where a stipulation is signed by counsel, to stay execution for sixty days, provided the defendant pay one-half of the judgment in thirty days: *Held*, that this did not amount to an absolute extension of time.

IDEM.—To be binding upon the parties, a stipulation of counsel must be filed in the case and incorporated in the judgment, or in a separate order of the court.

Opinion of the Court—Beatty, J.

SURETIES ON BOND—WHEN NOT DISCHARGED.—*Held*, that the stipulation in this case to extend time did not operate to discharge the sureties on the bond given to release property held under attachment.

APPEAL from a judgment of the District Court of the ninth Judicial District, Esmeralda County, Hon. S. H. CASE presiding.

The facts are stated in the opinion.

J. H. Hardy and Boring & Brown, for Appellant.

W. M. Seawell, for Respondent.

*By the Court, BEATTY, J.:

[*309]

In the spring of 1864, J. A. Brimhall brought suit against the Durand mill and mining Company for \$850, and sued out writ of attachment, which was levied on the goods of defendant.

To procure the release of these goods, D. Cohn and Solomon Ashim executed an undertaking which, after citing the attachment, etc., concludes as follows:

“Now, therefore, we, the undersigned, do hereby undertake, jointly and severally, in the sum of one thousand dollars, to the effect that we will, on demand, pay to the plaintiff the amount of any judgment that may be recovered in favor of said plaintiff in above action and costs of suit—not exceeding the said sum of one thousand dollars (\$1000).

“Sealed with our seals.

“Dated this 23d day of April, A.D. 1864.

“D. COHN, [L. s.]

“SOLOMON ASHIM, [L. s.]”

In the month of July, 1864, judgment was rendered in favor of Brimhall for seven hundred and fifty-one dollars and costs of suit. This judgment was never satisfied, and Brimhall assigned the undertaking, which was given for release of goods attached, to the present plaintiff, who instituted this action.

The defense made to the action is, that Brimhall, after Cohn and Ashim had executed the undertaking, extended

Opinion of the Court—Beatty, J.

the time of payment to the Durand mill and mining company without consulting them.

The portion of the answer setting up this defense, [*310] so far as it *relates to extension of time, and which it is material to notice, is as follows:

That, on the 5th day of July, 1864, and subsequent to the execution of said undertaking, the said J. A. Brimhall, for a valuable consideration, made and entered into a stipulation with said Durand mill and mining company, extending the time of payment of the judgment in said action sixty days, of which the following is a copy:

“In the District Court of the Second Judicial District, Esmeralda County, Nevada Territory.—*J. A. Brimhall*, plaintiff, v. *Durand Mill and Mining Company*, defendant. It is hereby stipulated and agreed by and between the above-named plaintiff and the above-named defendant, that plaintiff do have and recover judgment against said defendant in this action, for the sum of seven hundred and fifty-one dollars, and costs of suit; and that said judgment specify that the whole amount thereof be paid in United States gold coin.

“It is further agreed by said plaintiff, that plaintiff will stay execution upon said judgment for sixty (60) days from the date hereof; provided, that the defendant will, within thirty (30) days from this date, pay to plaintiff the one-half of the amount of said judgment.

“T. M. PAWLING,
Attorney for Defendant.

“W. M. SEAWELL,
Attorney for Plaintiff.

“A. XXXX, July 5, 1864.”

This answer was demurred to and the demurrer sustained. The defendant declined to answer further, and judgment was rendered for plaintiff. The defendant appeals, and the only question raised is, whether the execution of this instrument by the attorneys in the case of *J. A. Brimhall v. Durand Mill and Mining Company* operated as a release of Cohn and Ashim.

Appellant relies on the general proposition that extension

Opinion of the Court--Beatty, J.

f time to a principal without the assent of his surety exonerates the surety.

It has been frequently held in the case of guarantors of promissory notes that where the payee extends the time of payment, and so binds himself by a legal and valid contract that he cannot proceed to the collection of the note until the expiration of the time *mentioned in the [*311] new contract, this releases the guarantor, unless he has either expressly or by implication sanctioned the new contract for extension of time.

But whether the obligors in a bond given for the release of goods seized under attachment would stand in the same position, is not so well settled. These obligations are direct and positive obligations (at least such is the form of this undertaking) to pay any judgment that may be rendered against the party whose goods have been attached. Upon the rendition of the judgment, the parties to the undertaking might undoubtedly pay the same, and take steps against the judgment debtor, without any regard to any stipulations they may have made with the judgment creditor.

This would seem to be the view of a similar case taken by the supreme court of California. (*Palmer v. Vance*, 13 Cal. 553.)

On the other hand, we think, from the language used by Chief Justice Shaw, in delivering the opinion in the case of *William v. Valentine* (11 Pick. 156), that he was perhaps of a contrary opinion.

But whatever may be the rule in a case where the extension of time is made obligatory on the creditor, we do not think this case comes within the rule. The answer shows the signing of a certain agreement by the attorneys in the case, but this did not of itself operate necessarily as a stay of execution, for two reasons: First, the agreement is to stay the execution for sixty days, "provided, the defendant will, within thirty (30) days from this date, pay to the plaintiff the one-half of the amount of the said judgment."

Here there is an agreement to stay execution for sixty days "provided" something else is done within thirty days. There is no allegation that this other thing was done within the thirty days.

Opinion of the Court—Beatty, J.

Then, clearly, it does not appear plaintiff was bound to stay the execution for sixty days. Nor do we think he was even bound to stay it for thirty days. There is nothing to that effect in the agreement. As we interpret this instrument, it was in the discretion of plaintiff at any time to issue his execution, until the half of the debt was paid. If half the debt had been paid, then the defendants might have claimed the benefit of this contract. If paid before the issuance of execution, they might well have [*312] claimed that none should *be issued until the expiration of the sixty days after judgment. If paid after the issuance of the execution, the plaintiff would probably have been, at least morally, if not legally, bound to suspend any action under the execution until after the expiration of the stipulated period. We think, then, that the agreement itself did not amount to an absolute extension of time.

But there is another objection to this agreement. It was an agreement made in the progress of the trial by the attorneys.

Such agreements are proper enough in themselves, but if they are to affect the parties to the suit after the judgment is rendered, it seems to us they should be filed in the case (there is no evidence this ever was filed) and enforced by the judgment or order of the court. When parties agree, either by themselves or their attorneys, that a certain judgment shall be entered up, and that no execution is to be issued for a certain time on that judgment, the terms of that agreement should be incorporated in the judgment, or else in a separate and distinct order of court. Otherwise, we see nothing to prevent a party from violating such agreements. In this case, suppose the defendants had paid half the judgment immediately after its rendition, and the plaintiff the very next day had demanded execution for the balance, we see no way he could have been prevented from getting it. The clerk could not take notice of this paper, signed by the attorneys, but neither filed nor made the subject of any order of court. He must issue the execution when demanded. Possibly the court might in such a case, on proper appli-

Opinion of the Court—Lewis, C. J.

ation, stay the execution for the sixty days, but we would doubt the propriety of going behind the judgment even by the court.

We refer to the case in 11 Pick. just cited, for the effect and operation of such agreements when not acted on by the court.

The judgment of the court below must be affirmed, and it is so ordered.

G. H. MAYNARD v. ISAAC RAILLEY ET AL., UPON A WRIT OF CERTIORARI.

[2 NEVADA, 313.]

¹INQUIRY UPON CERTIORARI CONFINED TO JURISDICTION.—Upon a return to a writ of certiorari, this court can only inquire whether the tribunal certifying its proceedings has exceeded its jurisdiction.

RECEIVER—WHEN MAY BE APPOINTED.—The district court has the power to appoint a receiver on an *ex parte* application, when a proper showing is made.

IDEM.—The court will appoint a receiver when one partner excludes his copartner from a participation in the affairs of the partnership. So, too, when both partners have assigned their respective interests, and the assignees cannot agree.

IDEM.—When suit is brought and summons issued, the court has power to appoint a receiver before the summons is served on defendants; but the appointment of a receiver ought not to be made without notice, except in cases of emergency.

Williams & Bizler, for Petitioners.

Geo. A. Nourse and R. M. Clarke, for Respondents.

*By the Court, LEWIS, C. J.:

[*314]

This case comes before this court upon a writ of *certiorari* issued to the district court of the county of Ormsby, the defendants claiming that the court below had exceeded its jurisdiction in the appointment of a receiver of certain property and business in which all the parties to the action seem to claim some interest.

Sec. 403 of the civil practice act of this state, provides that "this writ may be granted on application by any court

Opinion of the Court—Lewis, C. J.

of this state, except a justice's court, in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor in the judgment of the court any other plain, speedy and adequate remedy;" and section 409 of the same act declares that "the review upon the writ shall not be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer." Evidently, the only question which can properly be inquired into upon this writ is that of jurisdiction.

If it appears that the jurisdiction of such tribunal, board, or officer has not been exceeded, there is no foundation for the writ. [*315] *The expression employed in the latter section above quoted, that the inquiry shall extend no further than to determine whether the inferior tribunal "*has regularly pursued its authority*," certainly does not authorize an inquiry into any irregularity or question beyond that of jurisdiction. If the issuance of the writ is only permitted when an inferior tribunal, board, or officer has exceeded his or its jurisdiction, it is clear that no other question but that of jurisdiction can be inquired into upon its return. A mere irregularity, however gross it may be, cannot properly be the subject of inquiry upon it. Hence, we will confine our considerations to the question of jurisdiction simply.

Sec. 143 of the practice act, which reads as follows, expressly gives the district court the power to appoint a receiver in certain cases: "A receiver may be appointed by the court in which the action is pending, or by a judge thereof. First. Before judgment, provisionally on the application of either party when he establishes a *prima facie* right to the property, or to an interest in the property which is the subject of the action, and which is in possession of an adverse party, and the property or its rents and profits are in danger of being lost or materially injured or impaired. Secondly. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal; and thirdly, in such other cases as

Opinion of the Court—Lewis, C. J.

re in accordance with the practice of courts of equity jurisdiction."

This section, it seems to us, settles the question of the power of the court to appoint a receiver in proper cases, and the complaint as clearly makes out a case in which the relief claimed by the plaintiff could not properly be refused. The bill or complaint contains substantially the following allegations: That in the month of July, A. D. 1864, the defendant, Isaac Railey, and one J. Neely Johnson, both of the county of Ormsby and state of Nevada, formed and entered into a copartnership for the purpose of erecting a quartz-mill in said county for crushing and reducing gold and silver bearing rock, and extracting therefrom the precious metals; that the copartnership thus formed transacted their business under the firm name of Johnson & Railey; that two hundred acres of land which were necessary to the convenient working of the quartz-mill were purchased, and the mill erected thereon; that the *co- [*316] partnersh^{ip} thus formed carried on the business of crushing and reducing gold and silver ores, from the 22d day of August, A. D. 1864, to the 6th day of March, A. D. 1865; that during this period the defendant Railey managed and controlled the entire business of the concern, which was very profitable, and that during that time he received as profits therefrom at least the sum of thirty thousand dollars; that out of such profits, Johnson had not received over six hundred dollars, although he was entitled to one-half of the net profits of the business; that in the month

March, A. D. 1866, the defendant Railey ousted Johnson from the possession of the mill, land, and all other property of the firm, and deprived him of all participation in the management of their property and business, and has ever since deprived him of all such control, and has ever since appropriated all the profits of the business to his own use; that in the month of September, A. D. 1866, Johnson, by his deed bearing date of that day, granted, bargained, sold and conveyed to the plaintiff in this action all his right, title and interest in and to the said land, mill, and all other personal property belonging to the firm of Johnson &

Opinion of the Court—Lewis, C. J.

Railey, together with all rights and claims of whatever description held or owned by him against the defendant Railey arising out of the business transactions of the partnership; that on the 7th day of August, A. D. 1866, Railey absconded from the state of Nevada, leaving the defendants Frankenthal and Williams in possession of all the property, real, personal and mixed, belonging to the said partnership; that Railey is, and was at the time of his absconding, insolvent and totally irresponsible, and that Frankenthal and Williams are also insolvent and irresponsible; that on the 4th day of October, A.D. 1866, the plaintiff demanded of the defendants Frankenthal and Williams, who were in possession of the property under Railey, to be let into possession thereof, but that they refused to give him such possession; that the use of the mill is *reasonably* worth the sum of twenty-five hundred dollars per month, and that owing to the insolvency of Railey, Frankenthal and Williams, the plaintiff is in danger of losing all the profits from the business of the firm, and all the rents of the mill and other property.

Upon a sworn complaint containing these allegations, the court below made an order appointing one Thomas [*317] G. Taylor receiver of *all the property of the firm of Johnson & Railey, and all the rents, issues, and profits thereof, and upon the refusal of the parties in possession to surrender the possession and control of the property to the receiver, the court made an order directing the sheriff of the county of Ormsby to place him in possession thereof. A stronger case for the interposition of a court of equity by the appointment of a receiver could hardly be made out.

In partnership cases where all the parties have an equal right, not only in the conduct of business, but also in its settlement after dissolution, a failure to agree among themselves, or the refusal of one partner to allow the other to participate either in conducting or the settlement of the business, obviously presents a case for the appointment of a disinterested party under the direction of the court to close up the business and protect the property. When the

Opinion of the Court—Lewis, C. J.

conduct of one partner is incompatible with the relations of the copartnership, and is likely to result in loss or injury to any of his copartners, it has been the invariable practice of courts of equity, upon the application of any of the partners, to dissolve the partnership and appoint a receiver. "Where," says Mr. Edwards, "either partner has a right to dissolve the partnership, and the agreement between the parties makes no provision for closing up the concern, it is a matter of course to appoint a manager or receiver on a bill filed for that purpose, if they cannot arrange the matter between themselves." (Edw., Receivers, 309.) A receiver will be appointed to settle up the business when it is shown that the surviving partner is insolvent, dishonest, or is not a fit person to close up the affairs of the partnership. (Id.)

Where two members of a partnership obtained a renewed lease of the partnership premises, and the administratrix of a deceased partner showed a *prima facie* title to participate in the benefits of it, a receiver was appointed to protect the property until the rights of the parties could be determined. (Id. page 310.) So upon a bill filed by the assignees of a bankrupt partner against the solvent partners, praying for the sale of the partnership effects, a division of the proceeds, and for a receiver, Lord Eldon decreed according to the prayer of the bill. "The consequence is," said his Lordship, "that the assignees of the bankrupt partner are become *quoad* his interest tenants in common with the solvent partners; *and the court must then apply [*318] the principle upon which it proceeds in all cases where some members of a partnership seek to exclude others from that share to which they are entitled, either in carrying on the concern or in winding it up when it becomes necessary to sell the property, with all the advantages relative to good-will," etc. The case of *Phillips v. Atkinson* (2 Brown's Ch. Cases, 272) seems to be directly in point here. In that case the plaintiff's and defendant's testators had been partners. A bill was filed for an account and the appointment of a receiver. The defendant opposed the appointment of a receiver as an imputation upon his character, insisting that he was a proper person to receive.

Opinion of the Court—Lewis, C. J.

Lord Kenyon, in delivering the opinion, said: "It was not at all so; that where there was a copartnership there is a confidence between the parties, and if the one dies, the confidence in the other partner remains, and he shall receive; but when both are dead there is no confidence between the representatives, and therefore the court will appoint a receiver." In the case under consideration, although neither of the parties are dead, yet their respective interests, having passed to third parties, the reason for appointing a receiver is the same in this case as in that of *Phillips v. Atkinson*. A receiver will also be appointed where any of the partners seek to exclude another from taking that part in the concern which he is entitled to have, whether such attempt to exclude occurs during the continuance of the partnership, or after its dissolution, and during the closing up of the business. (Edwards on Receivers, 329, and cases there cited.) Upon this point Lord Eldon, in the case of *Court v. Harris* (1 Turn. and Reess, 496), says: "The most prominent point in which the court acts in appointing a receiver of a partnership concern, is the circumstance of one partner having taken upon himself the power to exclude another partner from as full a share in the management of the partnership as he who assumes that power himself enjoys." In the case of *Williams v. Wilson* (4 Sandf. Ch., sec. 79), where it appeared that a partnership, which had been formed for the purpose of conducting an insane hospital and immigrant lazaretto, was broken up by cross-suits and disagreements among the partners, the court allowed a receiver, with directions to sell immediately the lease of the premises occupied, and the movables and good-will [*319] of the premises. Chancellor Walworth, in *delivering the opinion of the court in the case of *Martin v. Van Schaick* (4 Paige Ch. 479), uses the following language:

"Each partner has an equal right in this case to the possession and control of the partnership effects and business, and if they cannot agree among themselves, it is a matter of course to appoint a receiver upon a bill filed to close the partnership concerns on the application of either party."

These authorities clearly sustain the plaintiff's right to the appointment of a receiver upon the case made out in his complaint. Hence we have shown that the court below not only had the power to appoint a receiver, but that the case made out by the bill fully warranted the exercise of that power. But it is claimed the court had no jurisdiction to appoint a receiver at the time it did, because summons had not been served on the defendants, and no notice of the application given to them. An action had, however, been commenced, and summons had been issued when the receiver was appointed by the court, and it had full jurisdiction of the subject-matter. The very reason why a court of equity interposes in cases of this character is to prevent the mischiefs which might result from the tardy remedy of the courts of law. It is a familiar rule that equity will always lend its aid where the remedy in the courts of law is not adequate, or the delay in obtaining it is likely to result in injury or damage to the party seeking its aid. If a court of equity could make no order of the character made in this case until the service of summons on the parties to be affected by it, or until it was shown that they were purposely avoiding its service, equity would be shorn of half its efficacy. Many of the summary remedies which it affords are merely preventive, employed for the purpose of protecting a party from a threatened injury, but which, in many cases, would be utterly nugatory if the court were not permitted to employ it until after the summons or notice. If the parties to be affected by the appointment of a receiver were beyond the jurisdiction of the court, so that service of the summons could only be obtained by means of its publication, all the property sought to be protected by his appointment might possibly be wasted or destroyed, and the court would thereby fail to grant that protection or relief which, by the clearest principles of justice, ought to be awarded. The power exercised by the court in the appointment of a receiver upon an *ex parte* application, as [*320] was done in this case, is analogous to that exercised in granting a restraining order or temporary injunction. It is not unusual for the courts to grant a restraining

Opinion of the Court—Lewis, C. J.

order upon *ex parte* application at the time of the issuance of the summons and before it is served, and yet in many cases such an order would as effectually deprive a person of the full enjoyment of his property as the appointment of a receiver; and we have never heard it claimed that before such order could be made, summons must first be served on the person to be enjoined, or that if it were made before the service of summons, he was being deprived of his property without due process of law. As suit had been commenced, summons issued, and the court had jurisdiction of the subject-matter, we do not think it exceeded its jurisdiction in appointing a receiver. However, as the bill does not exhibit any great and pressing necessity for an immediate appointment of a receiver without notice to the defendant, the court did not exercise that caution which should be observed in making orders of this character. Such an error cannot, however, be corrected upon this proceeding.

A receiver should not be appointed *ex parte* except in cases where it is clearly shown that the delay which would result from the giving of notice would defeat the rights of the complainant, or result in great injury to him. Cases may unquestionably arise where an immediate and *ex parte* appointment of a receiver would be necessary to afford the plaintiff that protection to which he may be justly entitled. This case does not, however, present any such pressing necessity, and we think notice should have been given; yet as the order has been made, it should be allowed to stand until the defendant show cause why it should be set aside.

The order of the court below is affirmed.

Opinion of the Court—Beatty, J.

STATE OF NEVADA, APPELLANT, v. WILLIAM SALGE,
RESPONDENT.

[2 NEVADA, 321.]

INDICTMENT—NEED NOT BE SIGNED BY DISTRICT ATTORNEY.—There is no statute requiring a district attorney to sign an indictment.

DISTRICT OR PROSECUTING ATTORNEYS.—"District attorney" and "prosecuting attorney:" *Held*, synonymous terms.

PLEA OF NOT GUILTY—RIGHT OF PRISONER TO WITHDRAW.—When a prisoner has pleaded "not guilty," it is in the discretion of the court whether or not to allow him to withdraw that plea to interpose another. The prisoner has, however, an absolute right to withdraw that plea to interpose any good defense which has arisen since the last continuance of the case.

CONTINUANCE—WHEN IT OUGHT TO BE GRANTED.—When a prisoner makes out a proper case for continuance, on account of the absence of a material witness, it is error to compel him to go to trial on the admission of the district attorney that the witness, if present, would swear to the facts as stated by defendant.

DEM.—Although the prisoner may not have made out a very clear case for a continuance, still if the court below was of opinion that injustice was done the prisoner because of the absence of his witness, the court was justified in granting a new trial.

ORDER EXCLUDING WITNESSES FROM COURT-ROOM—EFFECT OF.—When an order is made excluding defendant's witness from the court-room, and some of the witnesses come in during the trial, this may discredit such witnesses, and subject them to punishment for contempt; but the defendant himself, not being in fault, is entitled to their testimony.

APPEAL from an order granting a new trial in the District Court of the Second Judicial District, Ormsby County, Hon. R. S. MESICK, Judge of the First Judicial District, residing.

The facts are stated in the opinion.

Thomas E. Haydon, for Appellant.

**J. Neely Johnson, J. J. Musser, and R. M. Clarke*, [*322]
for Respondent.

By the Court, BEATTY, J.:

Wm. Salge was indicted for grand larceny. He was first tried and convicted and sentenced in Douglas county, where the offense was alleged to have been committed. That judgment was reversed, and the defendant obtained a change of

Opinion of the Court—Beatty, J.

venue to Ormsby county. He was again put on his trial, and the jury again found him guilty. The court before which he was tried made an order granting him a new trial, and the state appeals from that order.

The new trial was applied for on various grounds of alleged error committed by the court during the progress of the trial. The judge seems to have thought he did err in some one or more of the points alleged to have been error.

The appellant now takes on itself to show that the court did not err in the progress of the trial; that the only error was in supposing and acting upon the proposition that some error had before that time been committed.

This leads us to the necessity of examining *seriatim* the errors alleged to have been committed in the progress of the trial.

By consent of parties, on the eleventh day of [*323] June, 1866,* the trial was set for the twenty-seventh of that month, with the express understanding when the case was set, that the defendant, in agreeing to set the trial for that day, should not be considered as having waived any right "to object to the indictment by motion, demurrer, plea or otherwise." On the twenty-ninth of June, the case came on in its order for trial, and defendant asked leave to withdraw his plea of not guilty, which had been entered prior to the trial in Douglas county. The court refused to allow the withdrawal of the plea unless upon good cause shown. The defendant then moved for leave to file motion to quash indictment. This the court also refused unless some good cause were shown for so doing. The defendant then presented to the court a written motion to quash the indictment because it was signed by the "prosecuting attorney of the eighth judicial district," an officer unknown to the law. The court ruled that the written paper contained no good ground for quashing the indictment, and refused to let it be filed.

Respondent contends that the indictment was defective; that it should have been signed by the "district attorney of Douglas county," and not being so signed the court should have allowed the motion to be filed, and should thereon have quashed the indictment.

We know of no law which requires an indictment to be signed. Sec. 234 of the criminal practice act states what the indictment shall contain. Sec. 235 gives the form of an indictment. Sec. 243 states that an indictment shall be sufficient when certain things can be understood therefrom. Among other things, "that it was found by a grand jury of the district in which the court was held."

But in none of these sections is anything said about the indictment being signed by the district attorney. Hence we are inclined to think it is not at all necessary that an indictment should be signed by the district attorney. But even if such signature were necessary, we think in this case the signature was not defective. This court and all other courts must take judicial notice of the laws of the state. We know that Douglas county, and that county alone, composed the eighth judicial district of the state of Nevada when this indictment was found. We also [*324] know that district attorney and prosecuting attorney are synonymous terms.

The Constitution calls this officer district attorney. But the law prescribing the duties of these officers says they shall be "public prosecutors" in their respective counties. (Stat. 1864-5, 387.) In another law of the same legislature (see pp. 163-4) the terms district attorney and prosecuting attorney are used to designate the same officer.

The term, then, district attorney or prosecuting attorney of Douglas county would be one and the same thing. So prosecuting attorney of the eighth judicial district of Nevada is the same thing precisely as prosecuting attorney of Douglas county, because Douglas county constitutes the eighth judicial district.

The defendant then asked leave to withdraw his former plea of not guilty and file a plea of former conviction. That plea was offered to the court, and set out the facts of the former trial, conviction and sentence in Douglas county, and that the defendant had been for a short period confined in the state prison under the judgment based on the conviction in Douglas county.

It is well settled that, where a prisoner has pleaded not

Opinion of the Court—Beatty, J.

guilty, it is in the discretion of a court whether or not to allow him to withdraw that plea to interpose another and different plea. (1st Chit. Cr. Law, 436.)

There is, however, this qualification to that rule: if the defendant wishes to plead something which would be a good defense, and which has taken place since the last continuance of the cause, then he has an absolute right to do so. The court could not deprive a party for instance of the right to plead a pardon which had been granted since the last continuance of the case.

In this case the court had a right to refuse to let the prisoner withdraw his plea of not guilty. But at the same time, if a good plea of *autrefois acquit* since the last continuance was interposed by the defendant, the court must properly dispose of that before proceeding with the trial of the issue, guilty or not guilty.

But in this case we think the plea was not a good one, because it is not averred that there had been a prior *lawful* conviction. The plea is informal, and therefore the court

had a right to disregard it and proceed with the trial [*325] on the plea of not guilty. Had *this been a real *bona fide* plea, and only defective in form, doubtless it would have been more consonant with justice for the court itself to have suggested the amendment in form necessary to make it an available defense. But in this case it was a mere attempt to plead a judgment of the district court of Douglas county, which had been reversed by this court, and consequently was no bar to any future prosecution or proceeding on the same indictment. The court was right in disregarding this plea and proceeding to trial.

After these preliminary motions were disposed of, the defendant filed an affidavit, and thereupon moved for a continuance on account of the absence of material witnesses. The court ruled that a continuance would be granted unless the state would admit that the absent witnesses, if present, would swear to the facts as alleged in the affidavit. Upon the state making this admission, the defendant was forced to go to trial without his witnesses. Respondent now contends, and we think rightfully, that if he made out a case

Opinion of the Court—Beatty, J.

for continuance, it was error to compel him to go to trial on such admissions. An admission that if a witness were present he would swear to certain facts is not calculated to have the same effect as if a respectable witness were present in court, swearing to the same state of facts. We think that where a defendant makes out a clear case for a continuance, owing to the absence of a witness, and shows that he is likely to obtain the testimony of that witness by the next term of the court, he is entitled to the continuance, notwithstanding the state may be willing to admit that the witness, if present, would swear as claimed by the defendant.

In this case the defendant's affidavit did not, perhaps, make out a very clear case for a continuance. The court might, in its discretion, perhaps, have either granted or refused a continuance, even without imposing any conditions on the state. The conditions, if they did not benefit the defendant, certainly did him no harm. Upon this branch of the case we think it was very much in the discretion of the judge of the court below, whether he should or should not grant a new trial. If, from all the circumstances as developed on the trial, the court was satisfied that injustice was done to defendant in not allowing him further time to procure his witnesses, and there was any probability that their presence might*have varied the result, [*326] then we think the court would, on this ground, have been justifiable in granting a new trial.

There was, however, one other point in which we think the court erred during the progress of the trial, and which must sustain the action of the court in granting a new trial. The defendant, at the commencement of the trial, asked the court to place the witnesses of the state under rule, so that no one witness might hear another giving his testimony. This was done; and upon the request of the district attorney the defendant's witnesses were placed under a similar rule. During the trial some of the defendant's witnesses came in and heard a part of the testimony for defense, and for this reason were afterwards excluded from testifying. The record does not show how much of the evidence they

Points decided.

heard, whether their presence was accidental, and a mere oversight in the witnesses, or whether it was a deliberate disobedience of the order of the court. Nor does the record show that the defendant himself was at all blamable for their presence. Being a prisoner at the bar, on trial, it is hardly presumable the defendant could have controlled the witnesses. No misconduct on their part (in which the defendant did not participate) could deprive the prisoner of his right to have the testimony. If the witnesses willfully disobeyed the orders of the court, they laid themselves liable to punishment for contempt, and threw suspicion on their testimony, but did not affect the defendant's right to have the benefit of their testimony as far as it was worth anything.

The order of the court granting a new trial is sustained, and the court below will proceed with the further trial of the case.

W. H. GALLAGHER, APPELLANT, v. WM. DUNLAP,
RESPONDENT.

[2 NEVADA, 326.]

PLEADINGS—SUFFICIENCY OF ANSWER.—*Held*, that there must be a direct, and not argumentative, denial in the answer of the allegations in the complaint.

¹ *IDEM*—ANSWER DEFECTIVE IN FORM.—When an answer is put in, defective only in form, plaintiff should demur, and not move for judgment on the pleadings. He cannot, by moving for judgment on the pleadings, deprive defendant of the right to amend.

[*327] COSTS OF APPEAL—PAYMENT AS CONDITION PRECEDENT.—"It is not right to compel the unsuccessful party in this court to pay the costs of appeal as a condition precedent to making his defense in the court below.

APPEAL from the District Court of the Ninth Judicial District, Esmeralda County, Hon. S. H. CHASE presiding.

The facts are stated in the opinion.

Thos. H. Williams & W. M. Seawell, for Appellant.

Boring & Brown, for Respondent.

By the Court, LEWIS, C. J.:

The plaintiff, by his complaint in this action, alleges that on the 1st day of June, A.D. 1865, he sold and delivered to the defendant certain goods, wares and merchandise, consisting of "divers tons of gold and silver bearing quartz rock and ore," of the value of five hundred and ten dollars, for which the defendant promised and undertook to pay, &c. After denying the indebtedness in regular form, the allegation of a sale and delivery is met by the defendant in his answer in the following manner:

"And further denies that he ever had or requested of said plaintiff any goods, wares and merchandise of any kind or nature whatever, and more particularly divers tons of gold and silver bearing quartz rock and ore," at the place mentioned in the complaint.

Upon proper notice, the plaintiff moved for judgment on the pleadings, claiming that the answer did not sufficiently deny the material allegations of the complaint.

The court below overruled the motion and called the case for trial. As the plaintiff refused to try the case upon its merits, the court dismissed the complaint and rendered judgment in favor of the defendant for costs. From this judgment, and the order of the court overruling his motion for judgment, the plaintiff appeals.

*We are satisfied that the denial in the answer is [*328] not sufficient, and as the defendant refused to amend when the opportunity was extended to him by the court below, judgment for the plaintiff should have been granted. There is no sufficient denial of the sale and delivery of the rock in the answer. The defendant simply alleges that he never *had* the property which the plaintiff alleges was sold and delivered to him. If the defendant never *had* the property, the inference of course is that it was not delivered to him. It is, however, nothing but an *inference*. This form of denial or pleading is argumentative, and therefore not good. It is not a direct denial of the allegations of the complaint, but only the statement of a fact which is incompatible with the truth of such allegations, which is in fact no denial at all, and has always been held insufficient.

Opinion of the Court—Lewis, C. J.

“We have already seen,” says Mr. Chitty, “that pleading is a statement of facts, and not a statement of argument; it is therefore a rule that a plea should be direct and positive, and advance its position of fact in an absolute form, and not by way of rehearsal, reasoning or argument.” (1 Chit. Pl. 539; Steph. Pl. 382.)

Where, therefore, in an action of trespass for taking and carrying away the plaintiff's goods, the defendant pleaded that the plaintiff never had any goods, the court said: “This is an infallible argument that the defendant is not guilty, and yet it is no plea.” (Steph. Pl. 384.) This rule is also recognized under the modern practice. (1 Van Santv. Pl. 533.)

We are not prepared to say that under the present liberal rules of pleading, the extreme strictures of the old rule upon this point should be followed. Where, however, as in this case, there is some appearance of evasion, and even the inference to be drawn from the allegation of the answer is not by any means *absolutely* incompatible with the truth of the allegations of the complaint, we are compelled to hold that the denial in the answer is insufficient. It is possible that there was legally and technically a sale and delivery to the defendant of the property mentioned in the complaint, and yet, using the word in its popular signification, he might be able to swear that he never *had* the rock and ore alleged to have been delivered to him.

[*329] Hence, it is not such a direct and specific denial *as the law requires of a pleader, and in fact amounts to no denial at all.

The judgment of the court below must be reversed. The court will give the defendant a certain time within which to amend his answer, and if he neglects or refuses to do so, judgment must be granted in favor of the plaintiff.

Opinion of Beatty, J., on response to petition.

RESPONSE TO PETITION FOR REHEARING.

By the Court, BEATTY, J.:

In this case the court rendered a decision reversing the judgment of the court below. The appellant, in whose favor the case was decided by this court, now asks for a rehearing in order to obtain a modification of the order made by this court on reversing the judgment.

Whilst the present order, after reversing the judgment in the court below, directs that defendant shall be allowed to amend his answer, the appellant seeks to have the order made directing the court below to enter judgment for plaintiff on the pleadings. We see no reason for this. The regular practice, when a defendant puts in a defective answer, would be to demur to that answer. If the demurrer is sustained, then as a matter of course the defendant is allowed to amend. In this case, instead of demurring to the answer the plaintiff moved for judgment on the pleadings. This is hardly the proper course where the answer is merely defective in form or manner of denial, as in this case. When the answer admits all the facts necessary to entitle the plaintiff to a judgment, this motion would be proper enough.

And such admission might be made either directly in language or by a total failure to deny or to state facts inconsistent with the allegations of the complaint. But when there is an attempted denial of a fact necessary to sustain the plaintiff's action, however imperfect that denial may be, it should be reached by demurrer.

The plaintiff cannot be placed in a better position by having made a rather irregular motion, than he would be if he had demurred. It would be improper to modify our judgment, as requested.

*Petitioner further asks, if we will not make the [*330] order for judgment on the pleadings, that we require the defendant to pay the costs of this appeal as a prerequisite, a condition precedent to his being allowed to amend his answer and make his defense in the case. We see no reason for such a course. There is nothing in the case to show us that defendant is making a sham defense. For

Opinion of the Court—Beatty, J.

aught we know, his defense may be a perfectly good one. We are not disposed to deprive him of the opportunity of making his defense because, perchance, he may not have the ready money to pay the costs of this appeal.

JOHN J. CORBETT, APPELLANT, v. HENRY F. RICE
ET AL., RESPONDENTS.

[2 NEVADA, 330.]

ESTATES OF DECEASED PERSONS—SUIT ON ALLOWED CLAIMS.—Our statute in regard to probate matters does not prohibit bringing suit on an allowed claim, but simply denies the plaintiff costs if he recovers no more than the administrator was willing to allow. (LEWIS, C. J., dissenting.)

IDEM—JURISDICTION OF COURTS.—When others than the defendant are necessary parties to a foreclosure suit, the proceeding cannot be in the probate court, but must be in equity.

IDEM.—When only the mortgagee and the representative of the deceased mortgagor are necessary parties, the probate court and equity courts have concurrent jurisdiction.

IDEM.—In those cases where a probate court has jurisdiction and can administer full relief, it is in the discretion of a court of equity to assume jurisdiction, or turn the parties over to the probate court. And if a court of equity proceeds with the foreclosure, it has the right either to allow or refuse costs to the mortgagee.

[*331] *APPEAL from the District Court of the Second Judicial District, Ormsby County, Hon. S. H. WRIGHT presiding.

The facts are stated in the opinion.

Thomas Wells, for Appellant.

Clayton & Clarke, for Respondents.

By the Court, BEATTY, J.:

This was a bill filed to foreclose a mortgage executed by the testatrix, and after her death presented with the accompanying note to the executors, and allowed as a valid claim against the estate. The defendants demurred to the bill, and that demurrer was sustained and judgment rendered in favor of the defendants.

The ground of the demurrer was that the district court, acting as a court of equity, had no jurisdiction to hear or determine the cause; that it was a matter exclusively cognizable in the probate court.

The only question to be determined on this appeal is, whether the jurisdiction of the probate court in such cases is exclusive, or *whether there is a con- [*332] current jurisdiction in courts of chancery to enforce the mortgage against the executors.

It is contended on the part of respondents that the statute of this state in relation to the estates of deceased persons, confers exclusive jurisdiction on the probate courts to sell all property, real and personal, of decedents, necessary to be sold for the payment of debts. In support of this proposition, they cite many sections of the act in relation to the estate of decedents, and also many cases adjudicated in California on a statute almost identical in language with our statute.

Sec. 150 of our statute reads as follows:

“No sale of any property of an estate of a deceased person shall be valid unless made under an order of the probate court, *except as otherwise provided in this act or other acts.*”

The first part of this section exactly corresponds to section 148 of the California act; but the words italicized in our act are added to those contained in the California act.

In California the question arose several times, whether this 148th section of the act absolutely forbade the making of sales of property belonging to estates of deceased persons, otherwise than upon order of the probate court, or was only intended to forbid executors and administrators to make such sales without such order.

At first the courts were disposed to hold that no sales, whether judicial or otherwise, could be made, or at least ought to be made, of the property of a decedent, otherwise than by an order of the probate court. (See *Falkner v. Folsom's Executors*, 6 Cal. 412.)

But subsequently the rulings on this point were changed, and the courts of that state held this section was only in-

Opinion of the Court—Beatty, J.

tended to prohibit executors and administrators from selling on their own responsibility, without the order of the probate court, and did not prohibit judicial sales if otherwise properly authorized. (*Fallon v. Butler*, 21 Cal. 24.) Our 150th section, corresponding to their 148th, seems even more clearly than the California act to authorize the latter interpretation, and we think it should be so interpreted. It is claimed, however, that there are other sections which would, by implication at least, forbid a [*333] court of equity *entertaining jurisdiction of a foreclosure suit against the representative of a decedent.

Sec. 142 provides that the effect of a judgment shall be the same, and none other than the mere allowance of the claims by the administrator or executor. Hence it is concluded that the law-makers could not have intended to allow suits to be prosecuted and judgments obtained on *allowed* claims, where nothing would result from the judgment, but to leave both parties where they were before the judgment. So far as a simple judgment at law for a money demand is concerned, that argument would seem to be almost unanswerable. And perhaps it is to be regretted that the statute does not say in so many words no action at law should be maintained on an allowed claim. Indeed it seems to have been assumed by the learned judge, who rendered the opinion in the case of *Fallon v. Butler et al.* (21 Cal. 24), that such was the purport of the California act.

But, in truth, neither the California nor Nevada act contains any such prohibition. Sec. 138 of our act reads as follows: "No holder of any claim against an estate shall maintain any action thereon, unless the claim shall have been first presented to the executor or administrator." Sec. 136 of the California act is, we believe, identical in language with this. This language does not in terms prohibit the bringing of suits on claims allowed, nor restrict suits to claims rejected. Nor is there any other clause containing such prohibition or restriction. It only requires the presentation to the administrator or executor with the

proper proofs so as to inform him of the facts of the case, and allow him to act for the best interests of the estate. There is also another section (141) which will protect the administrator or executor from costs if he allows all that is justly due.

Now as the right to bring suit for any claim past due is a common law right, we do not think this act should be so construed as to be in derogation of that right. If any one should be foolish enough to bring suit on a simple money demand against an administrator, he would probably have to pay costs and gain nothing but an empty judgment, which, so far as this state is concerned, would place him in no better condition than the simple allowance of the demand.

*Possibly, if he wished to proceed against the [*334] estate of the decedent in another state or county, the judgment might be more available.

But when the demand is secured by mortgage, and other parties besides the decedent and mortgagee are interested, it would frequently be absolutely necessary to invoke the aid of a court of equity jurisdiction to afford proper relief.

Suppose A. borrows \$1000 of B., and executes his note and mortgage on a house and lot to secure the debt. He afterwards sells the house and lot to C., subject to the mortgage, and then dies. The property is depreciated in value so as to be worth only \$500. C., the purchaser, has come under no personal obligation, and A.'s estate is not fully solvent. How is B. to get his money? To get the claim allowed against A.'s estate won't do, because the estate is not solvent and would only pay a dividend without the mortgaged property. To abandon all claim against the estate, and pursue his remedy against the mortgaged property in the hands of C., he would get only \$500. The probate court could not make an order to sell the property of C., who is alive. The only way would be to proceed in equity against C. and the executor of A.; have a decree against the land, to sell that first, and then an order on the executor of A. to pay, in the due course of administration, any balance which the mortgaged premises did not discharge.

Opinion of the Court—Beatty, J.

We hold, then, that equity courts have jurisdiction to foreclose mortgages against the estates of deceased persons. In some cases those courts have exclusive jurisdiction; that is, in those cases where it is necessary to bring before the court other parties over whom the probate court can have no jurisdiction. In other cases, where the only necessary parties to the proceeding are the mortgagee and the representative of a deceased mortgagor, the jurisdiction of the probate court is concurrent with that of the equity court.

But whilst the two courts have concurrent jurisdiction in such cases, we think a court of equity has a discretion in any given case as to whether it will exercise that jurisdiction or leave the parties to the ordinary remedy in the probate court. In this respect, courts of equity are different from

courts of law. If a court of law has jurisdiction of [*335] a case and the parties thereto, it has no *discretion ordinarily to hear and determine it. But courts of equity exercise a discretion as to whether they will hear a case or afford the relief sought in various cases where there is no question as to their power and jurisdiction.

If a suit is brought where there are necessary parties, whose rights could not be adjudicated in a probate court, the equity court must of necessity hear the case. But if there are no necessary parties to the suit except the mortgagee and the representative of the mortgagor, then the chancellor might well refuse to entertain the bill, unless some special hardship would arise to the mortgagee by turning him over to the probate court.

If the mortgagee's security was sufficient to pay his debts at the time of bill filed, but likely to depreciate in value, and the personal estate of decedent were involved in litigation, and it was likely to be a long time before it was determined if it could be made available to pay the debts of the deceased, perhaps it would be just and proper to sell the mortgaged property under a decree in equity, before waiting to see if the personal property would pay the mortgage and other debts. If, on the other hand, the estate was perfectly solvent, and enough of the personalty to pay all debts, it would be hardly proper for the chancellor to

Opinion of Lewis, C. J., dissenting.

hurry the sale of the mortgaged property before the executor could realize from the personalty and extinguish the mortgage debt with the proceeds.

Every case of this sort would present itself very much to the discretion of the judge, and he might, in the exercise of a sound discretion, either hear and determine the case, or else, on motion, dismiss it without prejudice, leaving the party to pursue his remedy before the probate court.

But we think a demurrer cannot be sustained in a case like this unless the bill shows two things affirmatively: First, that it is a case where the probate court can administer full relief; second, that the court is actually proceeding and taking steps for the sale of the property.

The latter proposition is not shown in this bill, and therefore the demurrer should not have been sustained. The judgment must be reversed; but it is left entirely discretionary with the court below whether it will proceed with the trial of the case, or on motion dismiss the bill without prejudice, allowing the plaintiff to show, if he *desires it, either by amendment to his bill, or otherwise by affidavit, any special reasons for proceeding with the case. It is also entirely in the discretion of the court below, if the foreclosure proceeds in that court, to allow costs to the plaintiff, or withhold them, as he shows or fails to show on trial the necessity of this proceeding, as the court may apportion the costs in its discretion.

LEWIS, C. J., dissenting:

The record in this case presents but one question for determination upon this appeal, namely: Can an action of foreclosure be maintained against the estate of a deceased mortgagor after the note and mortgage have been allowed by the administrator as a valid claim against the estate, and before the final settlement? In my opinion, as a general rule, it cannot. The act entitled "An act to regulate the settlement of the estates of deceased persons" (Stat. 1861, p. 186) clearly directs the manner in which claims against the estates of deceased persons shall be presented and dis-

Opinion of Lewis, C. J., dissenting.

posed of. Section 135 declares that "every claim which has been allowed by the executor or administrator, and approved by the probate judge, shall, within thirty days thereafter, be filed in the probate court, and be ranked among the acknowledged debts of the estate, to be paid in due course of administration."

Sec. 136 provides that "when a claim is rejected, either by the executor or administrator, or the probate judge, the holder shall bring suit in the proper court against the executor or administrator within three months after the date of its rejection if it be then due, or within three months after it becomes due, otherwise the claim shall be forever barred." And section 142 declares that "the effect of any judgment rendered against any executor or administrator upon any claim for money against the estate of his testator or intestate, shall only be to establish the claim in the same manner as if it had been allowed by the executor or administrator and the probate judge; and the judgment shall be that the executor or administrator pay in due course of administration the amount ascertained to be due."

Though the bringing of a suit against the estate of a deceased person, as in this case, seems nowhere expressly prohibited in the *act* referred to, yet as another method of proceeding is explicitly prescribed, that, it seems to me, should be pursued, at least whenever it furnishes a complete remedy. So, too, the provision that suit upon *rejected* claims must be brought within a given time, also raises an implication that no suit should be brought upon claims allowed. Again: when a judgment is obtained against an estate, it is expressly provided that no execution shall issue thereon, and that its only effect shall be to establish the claim in the same manner as if it had been allowed by the executor or administrator. (Sec. 142.) Then the only object of the suit against the estate is to establish the claim as a valid demand against it to be paid in due course of administration. Hence, a judgment places the claim in no better position than if it were allowed by the executor or administrator as a valid demand against the estate. Indeed, the allowance of the claim, as a general

Opinion of Lewis, C. J., dissenting.

thing, is equivalent to a judgment against it. If the executor or administrator allow a claim, it is all the law requires him to do, and the creditor of the estate is placed in as favorable position as if he had his judgment. I can, therefore, see no cause of action against the estate. When, as in this case, the complaint shows the fact that the claim has been allowed, it is demurrable precisely the same as if it alleged a former suit and judgment upon the same claim, because the allowance of the demand gives it all the effect of a judgment against the estate. A judgment upon an allowed claim would be utterly useless, and for that reason, if no other, the estate should be protected from the burdens of litigation, which could result in no good. It is claimed, however, that the same rule governing unsecured claims against an estate does not apply to demands which are secured by mortgage. But I am unable to find that the probate act referred to recognizes any distinction. The law requires all claims to be presented for allowance or rejection, and prescribes the manner in which they shall be paid, and it seems to be conceded that the word "claim" includes secured as well as unsecured claims. And it is so held in California. (*Ellissen v. Halleck*, 6 Cal. 386; *Ellis v. Polhemus*, 27 Cal. 350.) The only distinction which the law seems to make between secured and unsecured debts is that the former shall have the proceeds of the security applied to its payment if the security is sold. The view which I have taken of this question is *fully sup- [*338] ported by the supreme court of California in the case of *Ellissen v. Halleck et al.* (6 Cal. 386), and *Falkner et al. v. Folsom's Executors* (Id. 412). True, some doubt was cast upon the authority of these cases by the same court in the case of *Fallon v. Butler et al.* (21 Cal. 24). But the authority of *Fallon v. Butler* has also been very much weakened by the more recent decision in the case of *Ellis v. Polhemus* (27 Cal. 350). I am, therefore, disposed to recognize the decisions in *Falkner et al. v. Folsom's Executors* as correctly announcing the general rule of law. I do not wish to be understood as holding that a court of equity has no jurisdiction in cases of this kind, but simply that

Opinion of the Court—Beatty, J.

as the allowance of a claim against the estate (where there are no necessary parties except the claimant and the executor) gives the creditor all the relief which a judgment would, the showing of that fact in their complaint, like the showing of a former judgment upon the same claim, would make the complaint bad on general demurrer.

The judgment of the court below should therefore be affirmed.

EX PARTE TERENCE G. SMITH.

[2 NEVADA, 338.]

HABEAS CORPUS—COMMITMENT, WHEN SUFFICIENT.—A regular commitment, under the seal of the court, properly attested, reciting all the material facts of the judgment, is sufficient to authorize the warden of the state prison to hold the prisoner.

¹ **IDEM—WHAT WILL NOT BE REVIEWED.**—*Habeas corpus* is not the proper writ to review the decisions of a court and correct its errors or amend its irregularities.

EVIDENCE TO CONTRADICT RECORD.—Oral evidence is never admitted to contradict the record, or to show error in the court rendering a judgment.

APPLICATION by petitioner to be discharged from custody upon a writ of *habeas corpus*.

Thomas Wells, for Petitioner.

George A. Nourse, Attorney-General, for the State.

[*339] *By the Court, BEATTY, J.:

In this case the prisoner asks to be discharged from the state prison, where he has been confined for some months past, and bases his petition upon two grounds:

First. That he is not held by any legal commitment or legal authority.

Second. There has been no legal judgment of imprisonment against him.

After sentence was pronounced against the prisoner, a regular order of commitment was made out, and he was carried to the state prison, and delivered into the custody

(1) See 9 Nev. 71.

Opinion of the Court—Beatty, J.

of the warden, who also received at the same time with the prisoner, the order of commitment, which is in the following words:

“The defendant, Terence G. Smith, having been indicted by the grand jury of the fourth district court of Washoe county aforesaid for grand larceny, and the said Terence G. Smith, having been duly arraigned on said charge before the above-entitled court, entered his plea of guilty, whereupon the court sentenced the said Terence G. Smith to one year’s imprisonment in the state prison to hard labor, and that the sheriff of this county take said Smith, within ten days from the date hereof, to the state prison, and that the term of said imprisonment date from the time of his delivery at the state prison.

“Now, therefore, it is ordered, adjudged, and decreed that the sheriff of this county, within ten days from this 4th day of June, *A.D. 1866, take Terence G. [*340] Smith to the state prison, and deliver him to the state prison warden, and that he be there confined one year from the date of his delivery there, to hard toil.”

The prisoner’s counsel contends this warrant is insufficient, because the four hundred and fifty-first section of the criminal practice act says:

“When a judgment has been pronounced, a certified copy of the entry thereof in the minutes shall be forthwith furnished to the officer whose duty it is to execute the judgment, and no other warrant or authority is necessary to justify or require the execution thereof, except where judgment of death is rendered.”

This section requires the clerk of the court to do a certain thing; that is, to furnish the officer or officers who are to execute the sentence forthwith with copies of the judgment to be enforced. Doubtless, in this case, the clerk should have given one copy of the judgment to the sheriff to authorize him to conduct the prisoner to the state prison. He should also have sent another to the warden of the prison to authorize him to detain the prisoner in custody. But the failure of the clerk to furnish these papers could not destroy the effect of the judgment of the court.

Opinion of the Court—Beatty, J.

Whilst we do not have before us by the return of the warden a full copy of the judgment, we have a regular commitment under the seal of the court, properly attested, reciting all the material part of the judgment, and showing fully the authority of the warden to hold the prisoner.

The four hundred and fifty-first section does not say a prisoner shall not be held unless the officer has a copy of the judgment, but merely dispenses with a more formal warrant in all cases except where the penalty is death. It does not vitiate or render unavailing a formal warrant reciting the judgment or the material portions thereof, and commanding the proper officer to carry it into effect. It only states what may be a substitute for such a warrant.

The legality of the judgment is contested on the ground that the sentence or judgment was passed in less than six hours after the plea of guilty was entered. The record of the case recites that the prisoner was brought into court, and pleaded guilty, "whereupon the court sentenced the said Terence G. Smith," etc.

The counsel for prisoner contends that this recital [*341] sufficiently *shows that there was no interval of time between the plea and sentence, but that the one followed immediately after the other. He further purposed to show, by oral testimony, that there was no interval, but that sentence was passed immediately after the plea was entered. The attorney-general admitted that such fact could be proved, and that it should be considered proved, if it was lawful to introduce oral testimony for the purpose of attacking the judgment.

Whether the recital above quoted does or does not sufficiently show that the sentence immediately followed the plea without the intervention of time which the statute (secs. 435-6 of the criminal practice act) requires, it is not now material to determine. If it does, it would at most but show error or irregularity on the part of the court below in not fixing a subsequent time for the passing of sentence. Such error must be taken advantage of in the manner prescribed by statute. The defendant should, in due time, have excepted to the action of the court and taken his ap-

Points decided.

peal to this court. *Habeas corpus* is not the proper writ to review the decisions of a district court and correct its errors or amend its irregularities. For the distinction between *unlawful* acts and those which are merely erroneous or irregular, see Hurd on *Habeas corpus*, 331 to 333. The proposition to introduce oral evidence to show error in the proceedings of the court below is to us a novel one, to say the least of it. Oral evidence is sometimes introduced in connection with the judgment record, to show what was litigated by the parties; to show the facts more fully than they would be shown by the record. But oral evidence is never admitted to contradict the record, or to show error in the court rendering a judgment.

The prisoner must be remanded to the custody of the warden of the state prison, there to remain until the expiration of the term for which he was sentenced, or until otherwise legally discharged.

BROSNAN, J., concurring:

I concur in this opinion merely upon the ground of the confession of guilt of the prisoner in open court.

MEARS ET AL., RESPONDENTS, v. JOHN JAMES ET AL.,
APPELLANTS.

[2 NEVADA, 342.]

AMENDMENT OF COMPLAINT—LEAVE TO ANSWER.—It is error to render judgment against a party who is made defendant by amending a complaint without giving him an opportunity to answer.

PARTNERSHIP—HEARSAY EVIDENCE.—Hearsay evidence cannot be received to show that one is a partner in a particular firm.

¹ **IDEM—WHEN NOT ESTABLISHED.**—Parties renting property to amalgamators crushing their ore and running it into their amalgamating pans, at a fixed price per ton, do not thereby become partners with the amalgamators.

² **IDEM—NOTICE TO THE WORLD.**—A. & B., being partners in any particular business, A. is not bound to notify the world, nor any particular person, that he is not a partner of B.'s in a new and distinct business into which B. enters with other partners and under a different firm name.

Opinion of the Court—Beatty, J.

APPEAL from the District Court of the Fourth Judicial District. EARL J. C. GOODWIN presiding.

THE FACTS ARE stated in the opinion.

FRANK F. FICK, for Appellants.

FRANK E. HERRIS, for Respondents.

FOR THE COURT. BEATTY, J.:

IN THIS case a suit was brought on a merchant's account, and promissory notes, against two of the defendants, John James and James Hill, charging them to be members of the parties composing the firm of James & Co. One of the defendants, James Hill, answered, denying all the allegations of the complaint so far as he was concerned, the excuse being that he was not a member of the firm of James & Co. After the trial had commenced, the plaintiffs asked and obtained leave of the court to amend their complaint by adding the names of W. H. James, Jasper O'Farrell, E. A. Mier and J. W. Farrington as defendants. When this amendment was made, W. H. James, who was absent from court, asked for time to be given him to answer the complaint before the trial proceeded. This the court refused. After the plaintiffs had introduced their evidence, James Hill moved for a nonsuit as to himself, which the court refused. The trial then proceeded and judgment was had against all the defendants. The defendants James Hill and W. H. James then moved for a new trial, which was refused. The grounds of error assigned are numerous, and many of them well taken. But it will be necessary to notice only a few of them.

In the first place, the nonsuit should have been granted as to James Hill, because the testimony of plaintiffs showed clearly that the firm of James & Co. consisted ostensibly of John James, E. A. Mier and J. W. Farrington. Possibly all or more of the sons of John James may have participated in the profit and loss of that firm by secret arrangement with their father, and thereby became responsible for the losses of the firm. But beyond all question, as shown by ~~James Hill's~~ own testimony, James Hill had nothing to do

with the profits or losses of that firm—was not a partner, and no act of his is shown whereby he became responsible for their debts. The only evidence introduced tending to show that Hill was a member of that firm was the testimony of one Bostwick, who says W. H. James told him Hill was a member of the firm of James & Co. This testimony was mere hearsay as to Hill, and could not have been considered so far as he was affected. W. H. James himself being a defendant, his declaration might have been received to affect him, but not to affect Hill.

The judgment is erroneous as to W. H. James, because he was not allowed the statutory time to put in his answer and make his defense.

The facts about this case are these (and about those facts there seems to be no dispute whatever): John James and James Hill were the owners as tenants in common of a piece of real estate, on which was erected a quartz-mill known as the Napa Quartz Mill. In January, 1862, they entered into a contract with Farrington & Mier, by which they leased to Farrington & Mier a piece of ground adjacent to the mill, and contracted to crush ore for Farrington & Mier, in their mill, run the crushed ore or pulp into the works of Farrington & Mier on the leased ground, and receive five dollars per ton for the crushing. They were also to increase the power and capacity of the mill, and to put drums on their main shaft, and thereby furnish motive power to Farrington & Mier for their amalgamating works.

After this arrangement was made between Hill and John James *on one side and Farrington & [344] Mier on the other, John James agreed to become a partner with Farrington & Mier in their reduction operations. From that time forward, the business of Hill and John James in crushing ore was carried on in the name of Hill & James, though some of their creditors had their names reversed, and charged their accounts to James & Hill. The other business, of amalgamating or reducing the crushed ore on the leased premises, was carried on in the name of James & Co.,—the latter company consisting of John James, J. W. Farrington and E. A. Mier.

The learned judge who tried this cause below seems to

Opinion of the Court—Beatty, J.

have thought that James Hill was responsible for the debts of James & Co., not because he was a member of that company, or in any manner interested in their business, but because they had erected their improvements on land in which he was part owner, and because one of the partners in the firm of James & Co. was also a partner with Hill in the firm of Hill & Co., and Hill never gave notice that he was not interested in the firm of James & Co.

In the first place, Hill & James leased certain real estate and contracted to furnish certain motive power to Farrington & Mier for a stipulated price. This did not make them partners with Farrington & Mier. Nor is there any presumption of law that a landlord is the partner of his tenant. Landlords certainly need not notify the world that they are not partners of their tenants. Secondly, after the lease was executed by James & Hill to Farrington & Mier, James, without the knowledge of Hill, so far as the testimony shows, became a partner with Farrington & Mier. We are unable to see how that could affect Hill. As James's partner, he was responsible for all legitimate transactions done in the firm name. But James was not acting for the firm or in the firm name when he entered into the firm of James & Co. This was a new firm, formed for a business separate and distinct from that of Hill & James. Certainly, it was not the business of Hill to follow James around the world and notify everybody, if James formed a new partnership he would not be responsible for the debts of such firm.

We have said, perhaps, more than was necessary about this case; but the case of *Jones & Colla v. O'Farrell & Co.*, lately decided by this court, involved the same questions [*345] as those involved in this *case. After that case was decided, the court below persisted in sustaining in this case the same rulings made in that. We have endeavored to so state our views that no further errors can be made in cases arising out of these partnership transactions.

The judgment of the court below is reversed, and a new trial ordered.

LEWIS, C. J., having been counsel in this case in the court
— did not participate in the decision.

Opinion of the Court—Lewis, C. J.

H. K. MITCHELL ET AL., RESPONDENTS, v. M. BROMBERGER, APPELLANT.

[2 NEVADA, 345.]

ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS.—Whenever, in a suit between the attorney and client, the disclosure of a privileged communication becomes necessary to the protection of the attorney's own rights, he is released from those obligations of secrecy which the law places upon him. He should not, however, disclose more than is necessary for his own protection.

¹ ERRORS TO JUSTIFY REVERSAL MUST BE PREJUDICIAL.—The judgment of an inferior court will not be set aside on appeal, for errors committed on the trial which it appears could not have prejudiced the appellant.

² ERRORS MUST BE AFFIRMATIVELY SHOWN.—When a cost bill appears regular on its face, and there is nothing in the record to show error in any of the items charged, the refusal of the court below to retax the costs must be presumed to be correct.

APPEAL from the District Court of the First Judicial District, Hon. RICHARD RISING presiding.

The facts appear in the opinion.

Perley & De Long, for Appellant.

**Mitchell & Hundley*, in *propria personæ*. [347]

By the Court, LEWIS, C. J.:

The plaintiffs, who are practicing lawyers in Virginia city, bring *this action to recover the sum of [*348] one thousand and thirty-seven dollars, which it is claimed is due them from the defendant for professional services rendered by them some time during the year 1865. The defendant puts in issue all the material allegations of the complaint by denying the indebtedness; denying that he ever employed the plaintiffs, or either of them, as his attorneys or counselors, or in any other capacity; and that they, or either of them, have ever acted as his attorneys or counselors, or done or performed any labor of any character whatever for him. Upon the trial the plaintiff Mitchell testified on his own behalf, and stated fully the manner in

(1) 3 Nev. 157; 4 Nev. 304; 5 Nev. 46, 239; 6 Nev. 57, 265, 378; 7 Nev. 336; 8 Nev. 263.

(2) 2 Nev. 271; 4 Nev. 71, 414.

Opinion of the Court—Lewis, C. J.

which he and his partner were employed by the defendant; detailed all the services rendered by them, and also stated the counsel which they gave the defendant in the matter in which they were employed.

The defendant objected to and moved to strike out a large portion of this testimony, upon the ground that it was information obtained by the plaintiffs whilst acting as counsel for him, and that it bore the character of privileged communication, which the plaintiffs had no right to disclose without his consent. The court below refused to strike it out. Of this ruling the defendant complains, assigns it as error, and relies upon it here as the principal ground for reversing the judgment below.

It is undeniably a general rule of the law of evidence that an attorney or counselor cannot, without the consent of his client, be compelled to disclose any fact which may have been communicated to him by his client, solely for the purpose of obtaining his professional assistance or advice; and section 344 of the practice act of this state explicitly adopts this rule in the following language: "An attorney or counselor shall not, without the consent of his client, be examined as a witness to any communication made by the client to him, or his advice given therein, in the course of professional employment."

In the complicated affairs and relations of life, the counsel and assistance of those learned in the law often becomes necessary, and to obtain it men are frequently forced to make disclosures which their welfare, and sometimes their lives, make it necessary to be kept secret. Hence, for the benefit and protection of the client, the law places the seal of secrecy upon all communications made to the attorney in the course of his professional employment, and [*349] the courts are expressly prohibited from examining him as a witness upon any facts which may have come to his knowledge through the medium of such employment.

But the claims of justice dictate some exceptions to this rule. It would be a manifest injustice to allow the client to take advantage of it to the prejudice of his attorney; or that

it should be carried to the extent of depriving the attorney of the means of obtaining or defending his own rights. It is, therefore, held that in such cases he is exempted from the obligations of secrecy. (*Rochester City Bank v. Suydam*, 5 How. Pr. 254.) In the opinion in that case Mr. Justice Selden says: "But, independent of this reasoning, and admitting all the previous conclusions to be erroneous, there is still another ground upon which, in my judgment, this notion must be denied. I think that where the attorney or counsel has an interest in the facts communicated to him, and when their disclosure becomes necessary to protect his personal rights, he must of necessity, and in reason, be exempted from the obligations of secrecy. For instance: suppose a client makes a private and confidential statement of facts by letter to an attorney employed to conduct a suit, inducing him to take a particular course with the suit, which proves eminently disastrous, and he is afterwards prosecuted by his client for unskillful management of the cause, can it be claimed that he cannot produce the letter in his justification? I apprehend not."

We think it safe to say that whenever in a suit between the attorney and client the disclosure of privileged communications becomes necessary to the protection of the attorney's own rights, he is released from those obligations of secrecy which the law places upon him. He should not, however, disclose more than is necessary for his own protection. In this case the appellant complains that a large portion of the plaintiff Mitchell's testimony consisted of facts which were communicated to him whilst he was acting as the attorney of the defendant, and the disclosure of which was not necessary for the protection of his own rights. If we agreed with counsel for appellant upon that fact, the judgment below could not, in our opinion, be reversed, for the evidence so improperly admitted is not of a character which could have injured the defendant in this case. That the judgment of an inferior court will not be set aside on *appeal for errors committed on the trial, [*350] which, it appears, could not have prejudiced the appellant, is a proposition thoroughly settled by the author-

Points decided.

therefore unable to determine from the transcript whether the court below *ruled correctly or not, but [*351] in the absence of positive error shown we must presume that the ruling was correct. Counsel for appellant mentions the error which they complain of in their brief, but that is not sufficient here. The record must show the error, if any exists. A statement of facts in the brief of counsel will not supply a deficiency in the record. Had it appeared that the one hundred dollar item was improperly charged, we could not hesitate to hold the ruling of the court below incorrect. But how are we to ascertain whether it is a legitimate charge or not? Most assuredly, only by the record in this case. We cannot go out of that record for facts upon which to determine the conditions of the ruling below, and as we have stated before, that record discloses no error.

The judgment of the district court is therefore affirmed, and it is so ordered.

STATE OF NEVADA EX REL. R. M. DAGGETT, RESPONDENT, v. JOHN A. COLLINS, APPELLANT.

[2 NEVADA, 351.]

¹ ELECTIONS, WHEN TO BE HELD.—An election cannot be held for an office at a time not fixed by law for such election.

IDEM.—The phrase, "next general election," in the nineteenth section of "An act to create a board of county commissioners," etc., (Stat. 1864-5), means the general election on alternate years, commencing with 1864, and has no reference to the election of 1865, which is in some respects to be held as a special election, interpolated on the general system of biennial elections.

APPEAL from the District Court of the First Judicial District, Storey County, Hon. R. S. MESICK presiding.

The facts are stated in the opinion.

R. H. T aylor, for Appellant.

**Dighton Corson*, District Attorney, for Respondent. [*352]

Opinion of the Court—Beatty, J.

By the Court, BEATTY, J.:

In the month of May, 1865, there was a vacancy in the office of superintendent of public schools for the county of Storey. The board of supervisors appointed John A. Collins to fill the vacancy. Prior to the November election, 1865, they made a further order for an election of a superintendent to fill a vacancy in that office which would occur by the expiration of the term of office of John A. Collins. At such election, the relator, R. M. Daggett, was a candidate for the office, and having received the largest number of votes cast, and a certificate of election, and having executed a bond and qualified as superintendent of public schools, demanded to be let into office.

This demand being refused, an action in the nature of a *quo warranto* was brought to remove Collins and place the relator in possession of the office.

The district court rendered a judgment removing Collins, but refused to place Daggett in office, deciding in effect that neither one of the parties was entitled to the office. From this judgment Collins appeals.

We find nothing in the Constitution to govern this case. The sections of the laws of Nevada bearing on the question are as follows: Section sixteen of "An act to provide for the maintenance and supervision of public schools," page 416 of the statutes of 1864-5, reads as follows:

"A county superintendent of public schools shall be elected in each county at the general election in the year eighteen hundred and sixty-six, and every two years thereafter, who shall take his office on the first Monday in January next succeeding his election, and hold for two years, and until his successor is elected and qualified. [*353] He shall take the oath or affirmation of office, and shall give an official bond to the county, in a sum to be fixed by the board of commissioners of said county."

This is the only law we can find providing for the election of superintendents of public schools. No such election can be held without some law authorizing it. (*Sawyer*

v. *Haydon*, 1 Nev. 75.) Consequently, the election in 1835 was wholly void and of no effect.

The next question is, did Collins hold his office subsequent to the election of 1865, or did the office become vacant without the means of filling it? Section nineteen of "An act to create a board of county commissioners," reads as follows:

"When a vacancy shall occur in any county or township office, except the office of county commissioner, the board of county commissioners shall appoint some suitable person, an elector of the county, to fill the vacancy until the next general election." (Stats. 1864-5, 262.)

Under this section, the board of county commissioners could undoubtedly fill the vacancy. The important question is, when should the appointment or commission issued by that board expire? The law says one thus appointed shall hold "until the next general election." The question is, when was the next general election after May, 1865? The Constitution evidently contemplates a general election every alternate year, commencing with 1864. The legislative branch of the government has carried out that view by declaring there shall be a general election in 1866, and each alternate year thereafter. (See Election Law of 1866.)

But for the purpose of starting the state government on its regular course, an election for assemblymen, and perhaps some other officers, was by the schedule of the Constitution provided to take place in the fall of 1865. This election for the year 1865 is called in the schedule a *general* election, but in some particulars it is rather a special than a general election. Neither the law nor the Constitution, so far as we can see, provided for the election in 1865 of any officers except members of the legislature and justices of the peace, whilst all the other state and county officers are required to be elected at the general elections held on alternate years, beginning with 1864.

*We think, then, to carry out the spirit and intention of the law-makers, we must interpret the phrase "until the next general election" to mean until the next general election at which a superintendent can be elected. In

Opinion of the Court—Lewis, C. J.

other words, that the “next general election” means the next general election taking place on an alternate year after 1864, and not in this particular law having any reference to the election of 1865, which was interpolated on the general system of our laws by the schedule to the Constitution. Any other interpretation would operate injuriously to the public interest, and would not conform to the spirit of the law, although it might to the letter thereof. The more liberal interpretation of this law may be highly beneficial to the public, and can injure nobody.

The judgment of the court below is reversed. The cause will be dismissed at the cost of the relator.

ADAM WALTER, RESPONDENT, v. J. NEELY JOHNSON
ET AL., APPELLANTS.

[2 NEVADA, 354.]

AGREEMENT—MEANING OF WORDS “ADVERSE CLAIM.”—Where property is sold for the sum of three thousand dollars and, by agreement of parties, one thousand dollars of the purchase-money is to be retained by the purchasers for six months to indemnify them for any adverse claim against the premises which they might be compelled to extinguish during that time: *Held*, that to release the purchasers from the payment of the one thousand dollars, they must show that a valid and substantial claim was set up to the premises; and that to protect themselves, they were compelled to purchase, or extinguish it.

IDEM.—“Adverse claim,” in such an instrument, must be interpreted to mean such a valid and paramount title or right which, if asserted in court, would divert the title granted by the plaintiff.

APPEAL from the District Court of the Second Judicial District, Hon. S. H. WRIGHT presiding.

[*355] *The facts appear in the opinion.

Sunderland, Wood & Hillyer, for Appellants.

Haydon & Denson, for Respondent.

[*358] *By the Court, LEWIS, C. J.:

This is a proceeding to enforce a vendor's lien which the plaintiff claims against certain property located on the Car-

son river, in the county of Ormsby. The property upon which it is claimed was sold by the plaintiff to the defendants on the 2d day of July, A.D. 1863, for the sum of three thousand dollars, two thousand of which was paid at the time of conveyance; the remaining thousand dollars was, by agreement of parties, to be retained by the defendants for six months from that time to indemnify them for any adverse claim against the premises which they might be compelled to extinguish during that time. That portion of the written agreement which is material in this case reads as follows: "And whereas, the said Railey and Johnson have paid two thousand dollars in cash to said Walter, and there remaining unpaid one thousand dollars, which is held as security by said Railey and Johnson to protect them from any adverse claim which may be set up to said property, franchise, or privileges, or any part thereof, by any other person or persons; now, therefore, if the said Railey and Johnson, their heirs or assigns, shall not, within six months herefrom, have to pay for the release or discharge of any adverse claim against said property or franchise, or part thereof, or have recovered against them any part or portion thereof, then the said Railey and Johnson agree to pay to said Walter, his heirs or assigns, the said sum of one thousand dollars in gold coin of the United States, at the expiration of six months herefrom; otherwise this bond to be null and void." The defendants having been compelled, as they claim, to purchase an adverse claim against the premises within the six months designated in the instrument above referred to, refused, and do now refuse to pay to the *plaintiff the one thousand dol- [*359] lars remaining unpaid of the purchase-money. The fact that the defendants paid about twelve hundred dollars for an outstanding claim or title to the premises purchased of the plaintiff, does not seem to be disputed.

It is, however, insisted upon by the plaintiff that the adverse claim set up by Hayt and Hill, and purchased by the defendants, was entirely without foundation or color of right, and could not be maintained as a valid right or title to the land in question; that no suit had been commenced

Opinion of the Court—Lewis, C. J.

against the defendants to eject them therefrom; that they have, ever since the conveyance to them, continued in possession of the premises, and that the purchase of the claim from Hayt and Hill was not necessary to maintain their possession. Such being the state of facts, the plaintiff claims, that under a proper construction of the bond or agreement between him and the defendants, he should recover the balance of the purchase-money. In this view of the case, we are disposed to agree with counsel for plaintiff. It is clear, beyond all question, from the evidence presented to us, that the Hayt and Hill claim was but the airy fabric of the imagination—a claim of right without foundation—and that had they commenced suit against the defendants to obtain possession of the premises, it is hardly within the range of possibility that they could have recovered, even after making due allowance for all uncertainties attending trial by jury. Indeed, there seems to have been no effort on the part of the defendants in the court below to show that the Hayt and Hill claim possessed any substantial virtue, or that there was any probability that they would ever have been evicted under it, or that it was in any manner a paramount title. The payment of money to extinguish or purchase such a claim does not come within either the letter or spirit of the instrument referred to. It could not have been the intention of the plaintiff to allow the one thousand dollars due him to be retained as security against any sham or invalid claims which might be made against the premises. The words of the instrument are: "Now, therefore, if the said Railey and Johnson shall not, within six months after the execution of the conveyance, have to pay for the release or discharge of any adverse claim, they will pay to the defendant the balance of one thousand dollars."

The only rational interpretation which can be [*360] placed upon this *language is, that one thousand dollars was to be paid to the plaintiff within six months from the time of the execution of the instrument, unless during that time the defendants, to protect themselves, were *compelled* to purchase some adverse claim. Now, what is meant by "adverse claim," as used in this in-

strument? Unquestionably, a valid and paramount title which, if asserted in court, would defeat that granted by the plaintiff.

By those words the parties certainly could not have meant all claims, whether founded in right or not, which might be set up to the premises, but only such claims as in all human probability would be held paramount or superior to that of the defendants. Instruments of writing must be interpreted so as to carry into effect the intention of the parties, and in ascertaining that intention, and construing the language employed by them, it is often necessary to resort to those known philosophical principles which in general govern the conduct of rational beings. All men have some degree of prudence in their nature, and are not disposed to place their rights at the disposal of the public, or to surrender their property to the first person who may make a claim to it, without a show of right. If we accord to the plaintiff even that ordinary prudence and discretion which men usually exhibit in transactions of this character, we cannot conclude that he intended to bind himself to relinquish his right to a third of the purchase-money of his property if any adverse claim, whether founded in right or not, should be set up to the premises. Neither can we believe that the defendant would have required anything so unreasonable from the plaintiff. Clearly, the thousand dollars was retained as security for the defendants against any valid or substantial right or title which, within six months from the time of the conveyance, they might be compelled to discharge.

It is evident, therefore, that to make the defense good, the defendants should have shown that the claim or title which they purchased was a substantial and valid one. This was not done, and hence we must affirm the order of the court below granting the plaintiff a new trial.

It is so ordered.



DECISIONS
OF
THE SUPREME COURT
OF THE
STATE OF NEVADA.

JANUARY TERM, 1867.

MORTH LEHANE, RESPONDENT, v. E. W. KEYES,
APPELLANT.

[2 NEVADA, 361.]

ANSWER—WHEN MAY BE STRICKEN OUT.—An answer palpably frivolous, or not verified when it should be, may be stricken out on motion, and if, after a reasonable time given to perfect such answer, it is not done, judgment may be rendered in accordance with the prayer of the complaint.

¹ APPEAL TAKEN FOR DELAY—DAMAGES.—It being apparent that the appeal was taken simply for delay, five per cent. upon the judgment was awarded to the respondent as damages.

APPEAL from the District Court of the First Judicial District, Hon. C. BURBANK presiding.

The facts appear in the opinion.

Mitchell & Hundley, for Appellant.

Francis L. Aud, for Respondent.

By the Court, LEWIS, J.:

The complaint in this action is upon a promissory note executed by the defendant and made payable to the plaintiff

Opinion of the Court—Lewis, J.

or his order. The defendant in the court below filed a general demurrer to the complaint, and at the same time put in what counsel was pleased to call an answer, the substance of which, however, is, that he had no answer to make. He "averts that he cannot answer the complaint because the same does not contain nor purport to contain a copy of the instrument or note sued on." The demurrer was overruled by the court below, and upon motion of counsel for plaintiff the answer was very properly stricken out, and after a delay of five days, granted at the request of the defendant, judgment was rendered in accordance with the prayer of the complaint. The plaintiff's motion to strike out was based upon two grounds: first, because the answer was not verified as required by the practice act; and second, because it was frivolous, presenting no defense to the plaintiff's right to recover.

Either of these grounds, it seems to us, was sufficient to justify the court in sustaining the motion. The answer is so palpably and unmistakably frivolous that we cannot see how the court below could possibly have refused to strike it out. From the judgment thus rendered in favor [*362] of the plaintiff, the defendant takes an appeal *to this court, which it seems to us was taken more for the purpose of delay than to secure the ends of justice. Such being the case, we deem it our duty to award the plaintiff five per cent. on the amount of the judgment, as damages for the delay which has thus been occasioned.

It is so ordered.

Opinion of the Court—Beatty, C. J.

SPARROW & TRENCH, APPELLANTS, v. C. L. STRONG
ET AL., RESPONDENTS.

[2 NEVADA, 362.]

¹ SUPREME COURT OF THIS STATE SUCCESSOR TO TERRITORIAL SUPREME COURT.

—The supreme court of the state of Nevada is the successor to the supreme court of the territory of Nevada, and has the same control over the records of the late supreme court in all cases where anything remains to be done, that it has over its own records.

CLERICAL ERRORS IN JUDGMENT—HOW AMENDED.—Courts of record may always amend a clerical error in a judgment or order at a subsequent term, when the error is shown by the record, and there is no necessity to resort to other evidence than is afforded by the record to correct the error.

IDEM—PENDENCY OF WRIT OF ERROR.—*Held*, that the pendency of the writ of error is not an impediment to the amending of the record so as to correct clerical errors. (BROSNAN, J., dissenting.)

MOTION to correct what was alleged to be a clerical error in a judgment entered up in the Supreme Court of the Territory of Nevada.

The facts are stated in the opinion.

C. J. Hillyer, for the motion, on behalf of Respondents.

Williams & Bixler, in opposition to the motion.

*By the Court, BEATTY, C. J.: [364]

In this case there is an application made to us by respondent to correct what is alleged to be a clerical mistake in entering up a judgment of the supreme court of the territory of Nevada, rendered in 1863.

There are various objections made by appellants to our granting the relief sought by the motion. Appellants contend that this court is not the custodian of the records of the late territorial court; is not the successor of that court, and has no jurisdiction over the parties to the record. In the case of *Hastings v. J. Neely Johnson*, ante, 190, lately decided by this court, we held that the state courts had jurisdiction to hear and determine causes left pending in

Opinion of the Court—Beatty, C. J.

the territorial courts at the time of the transition from a territorial to a state government. But it is said that a case which was finally decided in the supreme court of the territory and taken by writ of error to the supreme court of the United States, was not pending in the territorial courts at the time of change of government; that, so far as these courts were concerned, the case was finally disposed of; [*365] that the *territorial court had no longer anything to do with the case, and therefore, admitting we are in any sense the successors of that court as to all unfinished business, this case does not come under that class of cases.

In this last proposition appellants are clearly wrong. Whenever the case is disposed of on the writ of error, a mandate will, according to the regular course of practice in the United States supreme court, issue to some tribunal to carry the orders of that court into effect. That court has decided, where there is no inferior tribunal to which they can issue their mandate, they will not hear a case on writ of error, because their judgment in such case would be nugatory and incapable of being enforced. (*Hunt v. Palao*, 4 How. 588.) Then in the case under consideration, if the supreme court of the United States either affirms or reverses it, that court will send its mandate to some inferior court. As the territorial court has ceased to exist, this is the only court to which such mandate can be sent. That it will be sent to this court we may safely infer, from the fact that in the case of *Freeborn v. Smith* (2 Wallace, 160) the supreme court of the United States did send its mandate to this court in a precisely similar case.

It would seem, then, in any event, that something more is to be done in this case after the decision of the case on the writ of error, and the mandate to do what is necessary will be sent to this court.

The act of Congress of February 27th, 1865, providing for a district court in the state of Nevada, and other things, clearly provides that this court shall be the successor to the supreme court of the territory of Nevada, in cases of this kind. Our Constitution provides we shall be the successors to that court in all *pending* cases. The term "*pending*

Opinion of the Court—Beatty, C. J.

cases," as we understand it, in this connection, includes all cases in which anything remains to be done, and therefore includes this case. We think it may fairly be inferred from the decisions of the supreme court of the United States, in the cases of *Hunt v. Palao* and *Freeborn v. Smith*, just referred to, that the same view of our Constitution and the law of Congress is entertained by the supreme court of the United States. Jurisdiction is conferred on this court as the successor of the late supreme territorial court, by the concurrent act of the state authorities and the Congress of the United States. Under such *authority we hold [*366] that we have the same control over the records of that court that we have over our own, in all cases where anything remains to be done.

The next question to be determined is, whether we shall make the correction asked for? And in regard to this point, two things are to be considered: First, is it proper that the amendment asked for should be made, provided the pendency of the writ of error is no impediment to our action in the premises? and second, does the pending of that writ in a court of higher jurisdiction deprive this court of the power to make corrections in the record which would be otherwise proper?

With regard to the powers of courts to correct their records after the expiration of the term at which the record is made up, and as to the character of the evidence which will be received to guide the court in such corrections, there is much conflict of opinion.

But on one proposition there is perfect unanimity among all judges, courts, and we may say, well-informed lawyers. The court will at all times correct a mere clerical error, which can be corrected from the record itself. This, it appears to us, is precisely one of those cases. The plaintiffs and appellants had an action at law pending in the first district court of the territory of Nevada for certain mining ground. The case was tried, and verdict of jury for defendants. Plaintiffs asked for a new trial, and on the refusal of the court below to grant a new trial, plaintiffs filed the following notice:

Opinion of the Court—Beatty, C. J.

“Take notice, that the plaintiffs in the above-entitled action appeal to the supreme court of this territory from the order made in this cause on the thirteenth day of November, A. D. 1862, by the district court of the first judicial district overruling the plaintiffs’ motion for a new trial, argued and submitted at the May term of this court, to which ruling plaintiffs duly expected.”

Upon the service of this notice, the filing of the necessary undertaking, etc., the transcript was made out and the case brought before the supreme court of the territory for hearing. Now it is evident the only question brought before the supreme court for its adjudication was the question as to whether the first district court was right, or committed an error in overruling the motion for new trial.

[*367] *After the case was argued and submitted on this record, the court filed the following opinion or order: “Ordered, that the judgment of the court below in this cause be affirmed, with costs.” The clerk, in writing up the judgment, in supposed conformity to the opinion, entered it in the following manner:

“Now, on this day, the cause being called, and having heretofore been argued and submitted and taken under advisement by the court, and all and singular the law and the premises being by the court here seen and fully considered, the opinion of the court herein is delivered by Turner, C. J., Mott, J., concurring, to the effect that the judgment of the court below be affirmed.

“Whereupon it is now ordered, considered, and adjudged by the court here, that the judgment and decree of the district court of the first judicial district, in and for Storey county, be and the same is hereby affirmed with costs.”

To our mind it appears evident the clerk did not carry out the intent of the court as expressed in the written opinion or direction filed.

The court order the “judgment of the court below in this cause” to be affirmed. Now, what judgment could the court ~~mean~~ but the judgment appealed from? It did not mean

Opinion of the Court—Beatty, C. J.

to affirm all judgments between the parties named at the head of the order, nor any judgments between the said parties, but the one appealed from. The only judgment appealed from was the *judgment*, "judicial determination," or order of the court refusing a new trial. And this was the only judgment referred to by the court. The first paragraph of the judgment, as entered up by the clerk, read well enough; but in the second, some change should have been made to conform to the evident meaning of the order signed by two of the judges of that court. The words "and decree" should have been omitted, and after the word "county" the following words should have been added: "overruling the motion for a new trial." The judgment would have then read: "Whereupon it is now ordered, considered, and adjudged by the court here, that the judgment of the district court of the first judicial district, in and for Storey county, overruling the motion for a new trial, be and the same is hereby affirmed with costs," which would have clearly expressed the intention of the court.

*The territorial statute then in existence, it is [*368] true, defined a judgment and an order and drew a distinction between them. And it would have been more in consonance with the statute if the supreme court had said the *order* of the court below in this case is affirmed. But if they had expressed the same idea in other language, it would have been equally binding. The word "judgment" usually means either the final determination or the record expressing the final determination of a court as to the rights of parties litigant in a common law action. The statute clearly points out the distinction between the word "judgment" when used in this sense and the word "order."

The judgment of a court sometimes only means the judicial determination of a disputed fact or contested point of law. In the order filed by the court in this case it was used in this latter sense. Nothing is more common in courts than for a judge to make a short order directing the clerk to enter judgment. The clerk is then guided in entering the judgment by the order of the court and the record in the case. For instance: a judge says to the clerk, either

Opinion of Brosnan, J., dissenting.

peal in this case by the territorial supreme court, the appellants in this case may move to set aside the order making the amendment to the record and to place the case on the calendar for hearing.

It is therefore ordered that the judgment heretofore entered by the supreme court of the territory of Nevada be so amended as to read as follows:

"Sparrow & Trench v. C. L. Strong et al.—Now, on this day, this cause being called, and having been heretofore argued and submitted and taken under advisement by the court, and all and singular the law and the premises being by the court here seen and fully considered, the opinion of the court herein is delivered by Turner, C. J., Mott, J., concurring, to the effect that the judgment of the court below be affirmed. Whereupon it is now ordered, considered, and adjudged by the court here, that the judgment of the district court of the first judicial district in and for Storey county, overruling the motion for a new trial, be, and the same is hereby affirmed with costs." It is further ordered that the appellants may hereafter move to set this order aside, in case it shall have been held, or shall hereafter be held by the supreme court of the United States that the point on appeal to the territorial court in this case has never been decided.

BROSNAV, J., dissenting:

In view of the circumstances surrounding this case, I am unable to concur in the opinion of my associates. The reason of my *dissent is, that the appeal taken [*370] to the supreme court of the United States (which appeal is admitted to have been perfected in strict compliance with law and precedent) suspends all proceedings in this court pending such appeal, except as this court may be moved and empowered to act in the premises in obedience to mandate from the appellate tribunal. The application, in my opinion, should have been made before the court now having the case in charge.

Opinion of Beatty, C. J., on petition for mandamus.

S. C. FUGITT, PETITIONER, v. L. D. COX, RESPONDENT.

[2 NEVADA, 370.]

PETITION FOR MANDAMUS.

JUSTICE'S COURT—ENTRY OF JUDGMENT.—The filing of a notice of appeal and undertaking on appeal in a justice's court after the rendition of a verdict by the jury, but before the entry of judgment thereon, does not deprive the justice of authority to enter up judgment on the verdict.

IDEM.—A justice should enter up judgment immediately on the rendition of a verdict. But if he omits to do so the day the verdict is rendered, still he may complete his record by afterwards entering the judgment.

Daniel Virgin, for Petitioner.

No appearance for Respondent.

By the Court, BEATTY, C. J.:

This is a petition for a peremptory mandamus, based on affidavit in behalf of petitioner and the voluntary appearance of respondent.

Respondent is an acting justice of the peace. Petitioner was a defendant in an action pending in the court of respondent.

The case was tried before a jury, and the jury rendered verdict for defendant. Respondent entered the verdict as rendered, and then, without entering a judgment thereon in favor of defendant, entered an adjournment of his court. Thereupon the plaintiff gave notice of appeal, and filed his stipulation on appeal before any judgment was entered. Defendant then requested the justice to enter up the judgment in his favor for costs of suit. This the justice declined, because he doubted his authority to do so after appeal taken.

[*371] *The justice should, properly, have entered judgment before the adjournment of the court for the day. But, failing to do that, he should have done so as soon as his attention was called to the omission. The premature notice of appeal, filed before judgment was entered, could not deprive the justice of the power to enter the judgment on the verdict.

Opinion of the Court—Beatty, C. J.

A writ of mandamus will issue commanding the justice to enter up judgment on the verdict.

There is other matter set forth in the petition, but we think this is not the proper way to reach anything demanded, except the entry of the judgment on the verdict.

LEWIS, C. J., did not participate in this decision.

THOMAS E. HAYDON, PETITIONER, v. BOARD OF
SUPERVISORS OF ORMSBY CO., RESPONDENTS.

[2 NEVADA, 371.]

PETITION FOR MANDAMUS.

ACT TO CONSOLIDATE INDEBTEDNESS OF ORMSBY COUNTY CONSTRUED.—In construing this act: *Held*, that the auditor should accept bids of sufficient amount to cover all the money in the fund on the day bids are received.

1 *IDEM*—CONSTRUCTION OF LAWS.—Where a law is capable of two constructions, without doing violence to the language used: *Held*, that courts should give such construction as will be most beneficial to the public.

Thomas E. Haydon, for Petitioner.

S. C. Denson, District Attorney of Ormsby County, for Appellants.

By the Court, BEATTY, C. J.:

This was a petition for an alternative writ of mandamus. The respondents, by their attorney, the district attorney of Ormsby county, entered their appearance, waived the issuance of the alternative writ, and submitted the cause to the court on the facts as stated in the petition.

The proceeding is a friendly one, and the parties on both sides are anxious to have the opinion of this court on the proper *interpretation of two sections of the [*372] law passed and approved March 12th, 1866, for consolidating and paying the indebtedness of Ormsby county.

On the sixth of December, 1866, the treasurer of Ormsby

(1) 3 Nev. 141; *Old Fellows' Saving & Commercial Bank v. Quillan*, 11 Nev.

Opinion of the Court—Beatty, C. J.

county inserted the following advertisement in the *Carson Appeal*:

“COUNTY TREASURER’S NOTICE.—Notice is hereby given that there is now in the redemption fund of Ormsby county four thousand five hundred dollars, and that sealed proposals will be received by the county auditor of said county for the surrender of bonds, warrants, and claims payable out of said redemption fund; which proposals, inclosing or containing the bonds, warrants, and claims offered to be surrendered, will be received at the office of said county auditor until Monday, the 7th day of January, A.D. 1867, at 10 o’clock A.M.

“JOHN WAGNER,
“County Treasurer, Ormsby County.”

Various bids were made by the holders of county indebtedness, and among the bidders was the petitioner. The sum of forty-five hundred dollars mentioned in the advertisement was exhausted by bids more favorable to the county than those of the petitioner. But between the time of inserting the advertisement and the time within which the bidding was to be closed, there had been an additional amount paid into this redemption fund. If this additional amount be distributed to the bidders, the petitioner will have his bids accepted.

The only question is, whether, when the bids were opened, the county auditors and commissioners should have accepted bids of sufficient amount to cover all the money in the fund on the seventh day of January, 1867, or only such as was in the fund on the sixth day of December, 1866, when the advertisement inviting bids was inserted.

The difficulty arises only on the construction of two sentences, one in the fourth section and the other in the fifth section of the act. The doubtful language in the fourth section is as follows:

“That the auditor of said county will receive sealed proposals for the surrender of bonds, warrants, and [*373] claims payable out of said *redemption fund, to the

amount of his means to purchase, as provided in this act."

So far as this section is concerned, the whole question turns on the interpretation of the words we have italicized in the foregoing quotation. The point is, do they mean "to the amount of his means to purchase" with the funds on hand when he advertises for proposals, or the funds he will have on hand when the bids are opened? It appears to us the sentence is equally capable of either interpretation. The words in the fifth section are as follows:

"And the county treasurer shall open said sealed proposals, and accept the lowest bids for the surrender of any warrants, bonds, or claims payable out of said redemption fund *to the amount of money in such fund.*"

The words italicized in the foregoing quotation are the doubtful words in this sentence. It may be contended that they also refer to the amount of money "in the fund" when the advertisement or proposal for bids is made. But it appears to us the more natural construction of this sentence is to interpret this latter clause as referring to the time when the bids are received; that is, up to the last hour for receiving bids. It does not have any such immediate connection with the advertisement as to require any connection between the time of this sentence and that of the advertisement. Certainly it is doing no violence to the language of this sentence to make the time refer to the time of opening or receiving the bids. We think this interpretation is probably the most convenient to the county, and may save it some expense by avoiding too frequent advertisements. The only possible objection to the convenience and utility of this construction is, that the treasurer having barely five hundred dollars on hand, might insert his advertisement for bids, stating that fact. That between the day of inserting such advertisement and the day for opening bids he might receive many thousand dollars, and as only the comparatively small sum of \$500 would be mentioned as the amount on hand, bidders would be thus misled to the injury of themselves and the public.

There is certainly some force in this objection, so far as

Opinion of the Court—Beatty, C. J.

the policy of the matter is concerned. Still this objection may be in a great measure avoided. The law requires the treasurer, where he has a sum exceeding five hundred [*374] dollars, to advertise for sealed *proposals. That does not, of course, mean that at the precise moment the fund is on hand he shall send off his advertisement; but it would be a sufficient compliance with that clause if he inserted his advertisement at any time after the money came into the fund, and at least fifteen days before the next regular meeting of the board of county commissioners. Thus, if there was over \$500 in the fund at the beginning of any month, and he anticipated that a larger sum would soon be paid in, he could with propriety wait until the middle part of the month before inserting the notice in the paper, and still have it there in time for the funds to be distributed at the next regular meeting of the board. So, too, after mentioning in his notice the amount of funds on hand, he could state the fact that other funds applicable to this purpose were expected to be received before the time for receiving bids would expire. The court will not presume that the treasurer will fail to use a reasonable discretion in the matter.

The law then being capable of either construction without doing violence to the language used, we will give it such construction as will be most beneficial to the public. We shall hold that the county officers authorized to act in the premises shall distribute all money in the redemption fund when the bidding is closed. A positive mandamus will issue in accordance with the prayer of the petition. As the officers acted here doubtless in good faith, and the law was ambiguous, no costs will be allowed either party, but each will pay their own costs.

LEWIS, J., did not participate in this decision.

Opinion of the Court—Lewis, J.

O. F. GIFFIN v. H. MARTIN SMITH ET AL.

[2 NEVADA, 374.]

SHERIFF—WRONGFUL WITHHOLDING OF MONEY.—Section 10 of an act entitled “An act relative to sheriffs” (Stat. 1861, 103), only refers to those cases where there is a wrongful withholding of the money collected by the sheriff, and not where there is a mistake in its application, and it is shown that the sheriff has not the money in his hands.

IDEM—POLICY OF THE LAW.—It is not the policy of the law to inflict penalties upon its officers for mistakes or errors of judgment.

APPEAL from the District Court of the First Judicial District, Hon. R. S. MESICK presiding.

[*375] *The facts appear in the opinion.

Clayton & Clarke, for Appellant.

Hillyer & Whitman, for Respondent.

By the Court, LEWIS, J.:

Section 10 of an act entitled “An act relative to sheriffs” (Stat. 1861, p. 103), declares that “If a sheriff shall *neglect or refuse to pay over on demand, to the [*376] person entitled, any money which may come into his hands, by virtue of his office, after deducting his legal fees, the amount thereof, with twenty-five per cent. damages, and interest at the rate of ten per cent. per month from the time of the demand, may be recovered by such person from him and his sureties on his official bond, on application, upon five days’ notice to the court in which the action is brought, or the judge thereof, in vacation.”

Under this law the appellant, Robert Robinson, moved in the court below to recover from the sheriff of the county of Storey and his sureties the sum of fifteen hundred and nine dollars and thirty-four cents, with damages and interest, as provided by the section above set out. The court below refused the relief sought, and from that ruling this appeal is taken. The facts upon which this application is based are set out in the record as follows: “That in the above-entitled action (*Giffin v. Smith*) an order of sale was

Opinion of the Court—Lewis, J.

issued out of the district court of the first judicial district in and for the county of Storey, on the 15th day of May, A. D. 1863, directing certain property therein described to be sold by the sheriff of Storey county, and that by virtue of said order of sale, W. H. Howard, the sheriff, did sell at public auction the property therein described, on the sixth day of June, A. D. 1863, to O. F. Giffin, for the sum of eight thousand eight hundred and fifty-six dollars, which sum was paid by Giffin to the sheriff; that this sum came into the hands of Howard, by virtue of his position as sheriff of the county of Storey; that out of the proceeds of the sale the plaintiff, Giffin, was entitled to receive only seven thousand and eighty-three dollars; that Kinkead and Harrington, who were parties to the judgment in this action, were entitled to receive from the sheriff, out of the proceeds of the sale, the sum of one thousand and six dollars and twenty-three cents; and H. W. Johnson, who was also a party to judgment, was entitled to receive the sum of five hundred and three dollars; that the several sums which Kinkead and Harrington and Johnson were entitled to receive from the sheriff, were demanded from him on the eighth day of June, A. D. 1863, but that he has refused and continues to refuse to pay the same; that the applicant, Robert Robinson, is the assignee of these several claims. These facts appear in the petition of the appellant. In other parts of the [*377] record we find the judgment authorizing the sale referred to, together with the sheriff's return thereon, from which we are fully satisfied there was no such willful wrong or withholding of the money by the sheriff as will sustain this proceeding against him and his sureties. The court, in the action of *Giffin v. Smith*, rendered judgment in favor of the plaintiff for the sum of eight thousand four hundred and ninety-seven dollars and eighteen cents, besides costs.

The court then orders the sheriff to pay to the plaintiff, out of the proceeds of the sale of the mortgaged property, a sum equal to the amount of the note described in the mortgage, said note being for five thousand dollars, and bearing date January 16, A. D. 1862, with interest thereon,

from date until time of payment, at the rate of two and one-half per cent. per month, if the amount be sufficient to pay the plaintiff's judgment. The sheriff shall pay two-thirds of the balance of the proceeds of sale (if there be any) to Kinkead and Harrington, to apply on their judgment against the defendant and the other third to defendant Johnson."

In the sheriff's return to the execution, he says: "I paid to plaintiff, O. F. Giffin, the sum of eight thousand five hundred and ninety-two dollars and sixty-six cents, in full satisfaction of the judgment and decree upon which this order was issued, except the lien of defendants and interveners, Kinkead and Harrington, and the claim of H. W. Johnson, one of the defendants herein named, whose several claims are unsatisfied and unpaid."

The real amount due Giffin was but seven thousand and eighty-three dollars. Why the court rendered judgment for the sum of eight thousand four hundred and ninety-seven dollars and eighteen cents, whereas the note shows he was only entitled to recover seven thousand and eighty-three dollars and thirty-three cents, we are not able to ascertain from the record. We are inclined to the belief, however, that the sheriff was misled by this error in the judgment, for his return shows that the sum of eight thousand five hundred and ninety-two dollars was paid to the plaintiff, Giffin, which was the entire sum realized from the sale, except the court costs.

Here there seems to be nothing to indicate a willful or wrongful withholding of money to which the appellant Robinson is entitled. It was evidently an error, and the return shows that the sheriff has none of the money in his own hands. It remains, then, to be *determined [*378] whether the tenth section of the law referred to applies to cases of this kind. In our opinion it does not. The statute is highly penal in its character, and hence it could only be intended to cover cases where the officer willfully withholds money from those entitled to receive it. It is not the policy of the law to inflict a penalty upon its officers for mistakes or errors of judgment. It imposes

Opinion of the Court—Lewis, J.

punishments only for intentional and willful wrong, or the grossest carelessness. Its humanity is averse to the infliction of heavy penalties for errors where there is no intentional delinquency.

The supreme court of California, in the case of *Wilson v. Broder* (10 Cal. 486), say of a proceeding of this kind: "This remedy was only given for cases of intentional delinquency on the part of the sheriff, as a punishment for his willful or corrupt neglect of duty, and was not designed to embrace a case in which he declined to pay over money collected under circumstances of a *bona fide*, well-grounded doubt of the authority of the party to demand it."

And in the case of *Egery v. Buchanan* (5 Cal. 53), the court, in a case arising under a similar statute, says: "It is urged that the statute of this state, giving extraordinary damages against the sheriff for failing to pay over money collected on execution, has affected or altered the rule at common law. There is no reason for this position, and very strong reasons against it. The statute penalties are only recoverable when, by the return of the sheriff, he admits the collection of the money, and refuses to pay it over. If it was otherwise, an error of judgment, or even a hesitation to decide between adverse claimants, might work the ruin of any honest and conscientious officer." (See also *Johnson v. Gorham*, 6 Cal. 195.)

These authorities are supported by the clearest principles of justice, and they clearly sustain the ruling of the lower court.

As our conclusion upon this point disposes of the appellant's application, we do not consider it necessary to pass upon the other points raised on the record.

The order of the court below is affirmed.

INDEX.

ABANDONMENT.

- . **ABANDONMENT.**—There can be no strict abandonment of property without the intention to do so. The bare lapse of time, short of the statute of limitations and unaccompanied by other circumstances, would be no evidence of abandonment. *Mullett v. Uncle Sam G. & S. M. Co.*, 157.
- . **ABANDONMENT.**—Abandonment is a mixed question of law and fact. If, in fact, a person intend to give up his mining claim and quit paying assessments in pursuance of that intention, it is an abandonment in fact. *Oreanuno v. Uncle Sam G. & S. M. Co.*, 179.
- . **IDEM—FORFEITURE.**—A party who insists upon forfeiture or abandonment, and relies thereon to build up a right in himself to the thing, franchise or easement, forfeited or abandoned, is, upon first principles, bound to establish the fact or facts upon which his asserted claim of right depends. *Id.*

See CONTRACTS, 4.

ABATEMENT.

- . **ABATEMENT.**—Where parties having a joint right of action bring suit, and pending the litigation sever their interests, the suit will not abate. *Alford v. Devin*, 172.

See ATTACHMENT, 3.

ACCOUNT.

See ASSIGNEE, 1; COUNTY COMMISSIONERS, 3; MISTAKE, 1.

ACTIONS.

- . **JOINT ACTION—WHEN CANNOT BE MAINTAINED AGAINST MAKERS OF A NOTE.**—A joint action *at law* cannot be maintained against survivor and administrator of deceased maker of a promissory note. *Maples v. Geller*, 195.
- See EVIDENCE, 11; MALICIOUS ACTIONS, 1; VENDOR AND VENDEE, 1.

ADMINISTRATOR.

See ESTATES OF DECEASED PERSONS.

ADVERSE CLAIM.

See AGREEMENT, 2, 3.

AFFIDAVIT.

See ATTACHMENT, 2, 3; VENUE, 1.

AGENTS.

See MALICIOUS ACTIONS, 2, 3; PRINCIPAL AND AGENT.

AGREEMENT.

1. AGREEMENT—WHEN NOT VOID FOR UNCERTAINTY.—An agreement describing sufficiently the parties thereto, the property to be affected thereby, and providing that one party shall, *in presenti*, enter into possession of the property described, and hold it until a certain debt is paid out of the rents and profits of the property, is not void for uncertainty. *Hyman v. Key*, 148.
 2. AGREEMENT—MEANING OF WORDS "ADVERSE CLAIM.—Where property is sold for the sum of three thousand dollars and, by agreement of parties, one thousand dollars of the purchase-money is to be retained by the purchasers for six months to indemnify them for any adverse claim against the premises which they might be compelled to extinguish during that time: *Held*, that to release the purchasers from the payment of the one thousand dollars, they must show that a valid and substantial claim was set up to the premises; and that to protect themselves, they were compelled to purchase or extinguish it. *Walter v. Johnson*, 862.
 3. CON.—"Adverse claim," in such an instrument, must be interpreted to mean such a valid and paramount title or right which, if asserted in court, would divert the title granted by the plaintiff. *Id.*
- See CONSIDERATION, 1; CORPORATION, 5; MINING CLAIMS, 8; PLEADINGS, 6; RENT, 1.

ALIBI.

See EVIDENCE, 12.

ALIMONY.

See DIVORCE, 1.

AMENDMENTS.

See JUDGMENTS, 33; PLEADINGS, 3.

ANSWER.

1. SERVICE OF ANSWER NOT NECESSARY TO GIVE JURISDICTION. — Service of answer is for convenience of plaintiff's counsel, and may be enforced by the court, but is not necessary to give jurisdiction of the defendant. *Maples v. Geller*, 195.
2. ANSWER—WHEN MAY BE STRICKEN OUT.—An answer palpably frivolous, or not verified when it should be, may be stricken out on motion, and if, after a reasonable time given to perfect such answer, it is not done, judgment may be rendered in accordance with the prayer of the complaint. *Lehane v. Keyes*, 867.

See JUDGMENT, 5; PLEADINGS, 11.

APPEAL.

1. APPEAL DOES NOT LIE FROM AN ORDER MADE BY A REFEREE.—Under the organic act and laws of the Territory of Nevada no appeal could be taken from an order made by a referee. *Hamilton v. Kneeland*, 37.

2. **APPEAL TO SUPREME COURT OF UNITED STATES—WHEN CANNOT BE TAKEN.**—The right of appeal must be governed by the laws in force at the time the appeal is taken. A case commenced in the territorial courts and appealed to the supreme court of the territory, but decided by the supreme court of the State of Nevada, cannot be taken to the supreme court of the United States, merely because the organic act of the territory allowed it at the time the action was commenced. Such an inchoate right of appeal is not a vested right. *Hamilton v. Kneeland*, 50.
3. **IDEM—BETWEEN CITIZENS OF DIFFERENT STATES.**—The fact that the parties to an action were citizens of different States does not authorize an appeal to the supreme court of the United States after decision by the supreme court of the State. *Id.*
4. **APPEAL WILL NOT LIE FROM A JUDGMENT BY DEFAULT.** (*Per Brosnan, J.*) *Paul v. Armstrong*, 70.
5. **JUDGMENT, WHEN CANNOT BE REVERSED.**—A court of appellate jurisdiction cannot reverse a judgment produced by the voluntary act of a party. *Id.* 71.
6. **APPEAL ALLOWED FROM AN ORDER SUSTAINING A DEMURREE.**—An appeal in criminal cases may be taken from an order of the district court allowing a demurrer, though final judgment be not entered. *People v. Logan*, 89.
7. **ERRONEOUS JUDGMENT—APPEAL.**—When an erroneous judgment is entered and there is a motion made in the court below to have that judgment set aside, the appeal lies, direct from the judgment and not from the order refusing to set it aside. *Maples v. Geller*, 195.
8. **APPEAL MAY BE TAKEN FROM AN ORDER MADE AFTER JUDGMENT.**—The practice act of this State allows an appeal from a special order made after final judgment. *Ballard v. Purcell*, 290.
9. **APPEAL, HOW TAKEN.**—Under the laws of Nevada an appeal from the probate to the district court could only be taken by filing a written notice of appeal with the clerk, and serving a copy on respondent. *Lambert v. Moore*, 293.
10. **IDEM.**—A notice of appeal given orally to respondents, even if given in open court and entered on the minutes of the court, is not sufficient to make an appeal and dispense with the filing of a written notice. *Id.*
11. **IDEM.**—The filing and serving of a written notice of appeal must be followed by the filing of a proper undertaking, or the deposit in lieu thereof within five days, or the notice becomes inoperative and a nullity. *Id.*
12. **APPEAL—WHEN CANNOT BE TAKEN.**—This court has no jurisdiction to try an appeal from an order sustaining a demurrer where no judgment has been rendered. *State v. Earl*, 334.
13. **WHEN APPEAL DOES NOT LIE.**—An appeal from an interlocutory order granting a temporary injunction, will not be sustained when such interlocutory order was suspended by a final decree before appeal taken. *Easterbrook v. Upton*, 337.
14. **NOTICE OF APPEAL—WHEN MUST BE FILED.**—Where the notice of appeal is filed one day before the expiration of the time limited for taking an appeal, but the undertaking is not filed until three days after the expiration of that time, but within five days after the filing of the notice of

- appeal: *Held*, that the appeal was taken within the year allowed by statute. *Peran v. Monroe*, 408.
15. **APPEAL FROM AN ORDER MADE ON AFFIDAVITS.**—Where an appeal is taken from an order made on affidavits no statement is required, and those sections of the practice act making it the duty of the appellant to prepare a statement containing the grounds upon which he intends to rely on appeal, have no application to an appeal from such an order. *Gray v. Harrison*, 423.
 16. **APPEAL—REVIEW OF ORDER DISMISSING ATTACHMENT.**—Upon an appeal from a final judgment, this court will review an order of a district court dismissing an attachment, if the appeal is also taken from such order. *Williams v. Glasgow*, 447.
 17. **APPEAL FROM AN ORDER SETTING ASIDE JUDGMENT BY DEFAULT.**—An order setting aside a judgment by default is an appealable order, and if not appealed from, that order will not be reviewed after judgment on the merits. *Maynard v. Johnson*, 541.
 18. **NOTICE OF APPEAL—WHEN REVENUE STAMP MAY BE AFFIXED.**—A revenue stamp may be affixed to the notice of appeal even after motion to dismiss. When affixed, it renders notice operative from the time of filing. *Killip v. Empire Mill Co.*, 559.
 19. **APPEAL NEED NOT BE TAKEN FROM A VOID ORDER.**—It is not necessary to appeal from a void order which can have no operation or effect. *Id.*
 20. **COST BILL—APPEAL FROM JUDGMENT.**—The cost bill is no part of the judgment-roll, and where there is no statement or bill of exceptions, we cannot pass on its correctness. On a mere appeal from a judgment we cannot review any error which might occur in refusing to sustain a motion made, after the appeal was perfected, to strike out the cost bill. *Howard v. Richards*, 648.
 21. **SECTION 8, ARTICLE IV, OF CONSTITUTION CONSTRUED—APPEALS.**—Under the provisions of section 8, article VI of the Constitution, the legislature may prescribe the mode of proceeding on appeal from a justice's court to the district court. That mode may be by trial *de novo*, or a mere review of the justice's proceedings, as the legislature choose to direct. *Cavanaugh v. Wright*, 684.
 22. **COSTS OF APPEAL—PAYMENT AS CONDITION PRECEDENT.**—It is not right to compel the unsuccessful party in this court to pay the costs of appeal as a condition precedent to making his defense in the court below. *Galagher v. Dunlap*, 836.
 23. **APPEAL TAKEN FOR DELAY—DAMAGES.**—It being apparent that the appeal was taken simply for delay, five per cent. upon the judgment was awarded to the respondent as damages. *Lehane v. Keyes*, 867.
- See CERTIORARI, 1; COURTS, 1; COUNTY COMMISSIONERS, 1; DEPOSITION, 8; JUDGMENT, 3, 10, 22; JURISDICTION, 4; JUSTICE OF THE PEACE, 5; STATEMENT, 1, 2, 5.

APPELLATE COURT.

See JUDGMENT, 10.

ARBITRATION.

1. **ARBITRATION—STATUTES MUST BE STRICTLY CONSTRUED.**—Our statutory proceedings in cases of arbitration are in derogation of the common law, and must be strictly pursued. *Steel v. Steel*, 27.

2. **ARBITRATION—SUBMISSION OF, MUST BE FILED BEFORE A HEARING.**—The filing of the submission, and the entry of the same in the clerk's register, in cases of arbitration, answer the purposes of the complaint and answer in ordinary actions, and like them must be filed before a hearing, trial, or judgment. *Id.*
3. **IDEM—VALIDITY OF, HOW DETERMINED.**—At common law, scarcely any matter short of a want of power or jurisdiction appearing upon the face of an award, is subject to a question or inquiry, and every reasonable intendment should be made to uphold it. But in statutory awards no such liberal interpretation can be invoked to its aid. Its validity must be determined by the provisions of the statute providing it. *Id.*

ARSON.

- ARSON—AIDED AND ABETTOR IN CRIME MAY BE A PRINCIPAL.**—One may be principal in the crime of arson who does not himself apply the torch; if he be present aiding and abetting, he is a principal. *State v. Squaires*, 739.

ASSESSMENT.

1. **ASSESSMENT OF POSSESSORY CLAIM.**—Where the assessor, in making his assessment, uses the language: "One mine of four thousand four hundred feet, situated on Last Chance Hill," it does not convey the idea that he was assessing, or attempting to assess, the fee of the land in which the mine was situated, but the possessory claim of the miner, and right to mine on a certain lode or vein of ore. The meaning of this language is determined by common usage in this country. *State v. Real del Monte*, 437.
2. **IDEM—DESCRIPTION OF PROPERTY.**—The statute allows district attorneys, when bringing suit for delinquent taxes, to give a more particular description of the delinquent property than that contained in the assessment-roll. When the complaint does not contradict the assessment, but merely gives a more particular description, it is proper to admit testimony to show the property described in the assessment-roll and the complaint are identical. *Id.*

See TAXES, 19.

ASSIGNEE.

- ASSIGNEE OF ACCOUNT.**—An assignee of an account may sue on it in his own name, though the assignor have an interest in it. The assignor, in such case, need not be made a party. *Carpenter v. Johnson & Waddell*, 281.

See MORTGAGE, 9.

ASSIGNMENT.

See MORTGAGE, 12.

ASSUMPSIT.

1. **ASSUMPSIT—WHEN IMPLIED.**—A necessity being thus imposed on the incoming recorder to record the deeds left unrecorded by his predecessor, and that recordation inuring to the benefit of the prior possessor of the office, the law raises an implied request on the part of the outgoing

recorder to perform the labor, and an implied promise on his part to pay for the same. *Davis v. Thompson*, 17.

2. IMPLIED ASSUMPSIT.—When A. is morally and legally bound to perform certain labor, but failing to perform it himself places B. under the necessity of performing it to avoid loss or inconvenience, and A. receives the benefit of that performance, the law will imply both a request to B. to perform the labor, and a promise to pay for it when performed. *Id.* 20.
3. ACTION OF ASSUMPSIT TORTS.—The general rule of law is, that that which is in its inception a tort cannot be waived so as to support an action of assumpsit. *Carson River L. Co. v. Bussett*, 760.
4. IDEM—WHAT FACTS MUST BE SHOWN.—To enable a party to recover in assumpsit on implied promise, the plaintiff must establish such facts that a promise on the part of the defendant might reasonably be presumed from the transaction. No such promise can be presumed when the defendant commits a trespass under a claim of right. *Id.*

See CORPORATION, 5.

ATTACHMENT.

1. ATTACHMENT LAW OF 1861 CONSTRUED.—The attachment law of 1861 was not repealed by the amendment of 1864-5. The old law remains unimpaired as to debts contracted prior to the amendment, whilst the amendments have application only to liabilities incurred since the 1st day of April, A.D. 1865. *Williams v. Glasgow*, 447.
2. IDEM—SUFFICIENCY OF AFFIDAVIT.—When an attachment is issued upon a claim incurred prior to the 1st day of April, A.D. 1865, the affidavit is sufficient if it conform to the requirements of the act of 1861, and need not contain the averments required by the act of 1864-5. *Id.*
3. IDEM—PLEA IN ABATEMENT.—If the affidavit be insufficient, it cannot be taken advantage of after plea in abatement. Such a plea is a waiver of all defects in the affidavit. *Id.*
4. BOND TO RELEASE ATTACHMENT NEED NOT BE STAMPED.—A bond given to release property taken under a writ of attachment is a bond given in a legal proceeding, and does not require a stamp. *Bowers v. Beck*, 653.
5. IDEM—WHEN SUIT UPON MAY BE BROUGHT.—Where a bond is given for the use of a party to an action, but is in the hands of an officer of the court, the beneficiary of the bond may bring suit thereon before the bond has come into his possession. *Id.*
6. ATTACHMENT FOR FRAUD—SUFFICIENCY OF.—Where a debtor tells a creditor that he has disposed of all his property, and will pay when he gets ready, it creates a strong suspicion of fraud, and is a sufficient foundation for a belief in the creditor's mind that a fraud has been committed. *Id.*
7. IDEM—WHEN MAY BE ISSUED.—If there is some evidence to justify the belief on the part of an attaching creditor that fraud is contemplated or has been committed, he may sue out an attachment, and on the trial, that fraud may or may not be established; but if plaintiff fails on the trial to establish the fraud, still the issuance of the attachment was not a void act. Great strictness in the form of the affidavit should not be required, as the defendant is protected by bond. *Id.*

8. **PLEADINGS—BOND TO RELEASE ATTACHMENT.**—What is recited in a bond to be true, is taken as true against the obligor, and need not be averred or proved. It is only necessary to make averments and proof as to what was done after the execution of the bond, and as to the breaches thereof. *Id.*
 9. **BOND HELD VALID WHETHER ATTACHMENT SUSTAINED OR NOT.**—Where a bond for a release of goods under an attachment is conditioned for payment, if judgment is rendered against the owner of the goods attached, it becomes absolute upon the rendition of judgment whether the attachment is or is not sustained. *Id.* (LEWIS, C. J., *dissenting.*)
 10. **IDEM.**—There is nothing in the policy of the law to forbid a bond given to release property from attachment, being enforced according to the very letter of its condition. *Id.*
- See APPEAL, 16; MALICIOUS ACTIONS, 1, 2, 3; PLEADINGS, 10; SURETY, 1.

ATTEMPTS TO COMMIT OFFENSE.

See EMBRACERY, 1.

ATTORNEY.

1. **ATTORNEY'S FEES—FROM WHOM COLLECTABLE.**—An attorney who, at the request and for the benefit of a debtor, appears of record for the creditor in a confession of judgment by the debtor, may recover what his services are reasonably worth from the debtor. *Mitchell v. Bromberger*, 513.
2. **IDEM.**—An appearance of record would be *prima facie* evidence of the liability of the person for whom the attorney appears; but such *prima facie* evidence may be overcome by other proof, and the liability of another person established for a reasonable compensation; and it would be no contradiction of the record to show that such attorney was, in fact, employed by some other person, or that the services were in fact for the benefit of another. *Id.*
3. **DUTY OF COUNSEL.**—It is not the duty of counsel to inform their opponents that they are about to omit some steps in the proper management of their side of the case. *Killip v. Empire Mill Co.*, 559.
4. **ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS.**—Whenever, in a suit between the attorney and client, the disclosure of a privileged communication becomes necessary to the protection of the attorney's own rights, he is released from those obligations of secrecy which the law places upon him. He should not, however, disclose more than is necessary for his own protection. *Mitchell v. Bromberger*, 855.

BILL OF EXCEPTIONS.

1. **BILL OF EXCEPTIONS, HOW SIGNED.**—Bills of exceptions must be signed by the judge who tried the cause. *People v. Gleason*, 143.
2. **BILL OF EXCEPTIONS—TIME FOR SIGNING DIRECTORY.**—The time prescribed by the practice act within which a bill of exceptions in a criminal case is to be signed by the judge is merely directory. *State v. Salje*, 386.
3. **BILLS OF EXCEPTION—WHEN PART OF THE RECORD.**—As a general rule, bills of exception once signed and filed, become a part of the record. *Bowers v. Beck*, 658.

See INSTRUCTIONS, 7.

BILLS OF EXCHANGE.

See **BILLS AND NOTES.**

BILLS AND NOTES.

1. **NOTE BEARS INTEREST AFTER MATURITY.**—When a note is made payable at a given day, with interest at the rate of six per cent. per month until paid, it continues to draw six per cent. interest after maturity and after judgment. *Cox v. Smith*, 133.
 2. **INDORSEMENT OF NOTE.**—There can be no strict indorsement of a negotiable promissory note, except by the payee or indorsee. *Van Doren v. Tjader*, 322.
 3. **BILL OF EXCHANGE—PAROL TESTIMONY, WHEN ADMISSIBLE.**—When there is anything on the face of a note or bill of exchange showing that the party signing is acting for another, and not for himself, parol testimony may be introduced to bind the principal. *Gillig, Mott & Co. v. Lak Bigler Road Co.*, 727.
- See **ACTIONS**, 1; **CONSIDERATION**, 1; **EVIDENCE**, 15; **GUARANTY**, 1, 2, 3; **INTEREST**, 2; **LIMITATION**, 6; **PLEADINGS**, 18, 19, 23; **PRINCIPAL AND AGENT**, 2, 3.

BOND.

See **ATTACHMENT**, 4, 5, 8, 9, 10; **SURETY**, 1.

CASES CITED AS AUTHORITY.

- Hale & Norcross G. & S. M. Co. v. Storey County*, 1 Nev. 104; in *People v. Taylor*, 1 Nev. 109.
- School Trustees v. Commissioners of Ormsby County*, 1 Nev. 334; in *Thornburg v. Hermann*, 1 Nev. 473.
- Milliken v. Sloat*, 1 Nev. 573; in *Fox v. Barstow*, and *Sigismund v. Troianovich*, 1 Nev. 612.
- Burling v. Goodman*, 1 Nev. 314; in *Hastings v. Burning Moscow*, 2 Nev. 93.
- Cox v. Smith*, 1 Nev. 161; in *McLane v. Abrams*, 2 Nev. 208.
- State v. Waterman*, 1 Nev. 544; in *State v. Squaires*, 2 Nev. 233.
- Henry v. Confidence Co.*, 1 Nev. 619; in *Read v. Edwards*, 2 Nev. 265, and in *Mackie v. Lansing*, 2 Nev. 303.
- Sankey v. Noyes*, 1 Nev. 68; in *McFarland v. Culbertson*, 2 Nev. 285.
- Dwike v. Drubaker*, 1 Nev. 218; in *Sharon v. Shaw*, 2 Nev. 294.
- Sawyer v. Haydon*, 1 Nev. 75; in *State v. Collins*, 2 Nev. 353.
- Hastings v. Johnson*, 2 Nev. 190; in *Sparrow & Trench v. Strong*, 2 Nev. 322.

CERTIORARI.

1. **CERTIORARI, WHEN NOT INHIBITED.**—A writ of *certiorari* is not inhibited to a party aggrieved in all proceedings or actions wherein a right of appeal is given. *Ford v. Armstrong*, 70.
2. **INQUIRY FROM CERTIORARI CONFINED TO JURISDICTION.**—Upon a return to a writ of *certiorari*, this court can only inquire whether the tribunal certifying its proceedings has exceeded its jurisdiction. *Maynard v. Bailey*, 322.

CHALLENGE.

See JURY, 10.

CHARACTER.

See INSTRUCTIONS, 8; MOTIVE, 1,

CHARGE OF THE COURT.

See INSTRUCTIONS, 11.

CHOSE IN ACTION.

See TAXES, 10.

CITIZENSHIP.

See JURY, 5, 6.

CLOUD UPON TITLE.

See EQUITY, 12.

COMMERCE.

FEDERAL AND STATE POWER TO REGULATE COMMERCE.—The power to regulate commerce is not exclusive in Congress, but concurrent in the Federal Government and the States. No State law upon the subject will therefore be unconstitutional, unless in direct collision with some law or regulation of Congress. The power is exclusive in Congress only so far as it is exercised by it. The mere grant of power to the general government does not necessarily imply a prohibition upon the States. *Ex parte Crandall*, 251.

See TAXES, 3, 4.

COMMITMENT.

See HABEAS CORPUS, 2.

COMMON LAW.

1. COMMON LAW.—The common law of England, as adopted in this country, is usually to be taken as modified by English statutes passed prior to the declaration of American Independence. *Hamilton v. Kneeland*, 37.
2. STATUTE 32 HENRY VIII, CONSTRUED.—The statute of 32 Henry VIII, providing for entering, upon condition broken, is applicable not only to breach of condition in law, but also in deed. *Id.*
3. COMMON LAW.—The common law adapts itself to the circumstances and necessities of the community where it is introduced. *Hale & Norcross G. & S. M. Co. v. Storey County*, 83.

See ESTATES UPON CONDITIONS, 1; MINING CLAIMS, 11.

COMMON SCHOOLS.

See SCHOOLS.

CONDITION.

See ESTATES UPON CONDITION; PARDON, 3.

CONFESSION OF JUDGMENT.

See FORCIBLE ENTRY AND UNLAWFUL DETAINER.

CONSIDERATION.

CONSIDERATION—PARTIAL FAILURE OF, A GOOD DEFENSE.—A partial failure of consideration can be pleaded as a defense *pro tanto* to a note.

See CONTRACT, 2; GUARANTY, 4, 5; SEAL, 1.

CONSTITUTION.

1. CONSTITUTION—HOW CONSTRUED.—When language is used in the Constitution capable of two interpretations, and there is nothing in the general context of the instruments to determine which interpretation best conforms to the intention of the convention, then resort must be had to a strict grammatical construction of the language to determine its effect. *Vesey v. Herman*, 34.
2. SECTION 32, ARTICLE IV, OF CONSTITUTION, CONSTRUED. *Id.*
3. SECTION SIX, ARTICLE VI, OF CONSTITUTION, CONSTRUED.—The purpose of section six, Article VI, of the State Constitution was not to suspend the operation of the laws of the territory. The former judiciary system was intended to be, and was continued in existence until the new one should be in a condition to exercise its functions. *Armstrong v. Paul*, 110.
4. SECTION 13, ARTICLE XVII, OF THE CONSTITUTION, CONSTRUED.—Section 13, Article XVII, of the Constitution, is subject to this modification. It provides for continuance in office of all county officers whose office shall not be legally abolished before the first Monday of January, 1867. *State v. Telford*, 202.
5. TAXATION—SECTION 24, ARTICLE XVII, OF THE CONSTITUTION, CONSTRUED.—Section 24 of Article XVII of the Constitution prohibits taxation beyond one and one-quarter per cent. for State purposes during the first three years of its existence. *State ex rel. Nightingill v. Commissioners of Storey County*, 221.
6. *IDEM*—SECTION 3, ARTICLE IX, OF THE CONSTITUTION, DISCUSSED.—Section 3 of Article IX discussed and commented on. It does not qualify the 24th Section of the XVIIth Article. *Id.*
7. UNCONSTITUTIONAL LAW—WHEN BONDS NOT AFFECTED BY.—Tax levied under the law in question is illegal and void, but the bonds authorized to be issued are legal and valid debts against the State if negotiated. *Id.*
8. CONSTITUTIONALITY OF A LAW—WHEN WILL NOT BE EXAMINED.—It is an established rule that courts will not adjudge whether a law is unconstitutional or not, unless they are imperatively called upon to do so, by the admonitions of duty and the exigencies of the case. *Burling v. Goodman*, 266.
9. LIEUTENANT-GOVERNOR—SALARY AS WARDEN OF STATE PRISON.—The law making the lieutenant-governor of the State of Nevada *ex officio* warden of the State prison, and allowing him a salary for such services, does not conflict with that provision of the State Constitution which provides that no increase of compensation of certain officers shall take effect during the term for which they have been elected. *Crosman v. Nightingill*, 274.

10. **SPECIFIC CONTRACT ACT, IS PROSPECTIVE IN ITS OPERATION.**—The Act of the Legislature of the State of Nevada commonly called the "Specific Contract Act," is prospective and not retroactive in its operation. *Miliken v. Sloat*, 481.
11. **IDEM—UNCONSTITUTIONAL.**—Said act is in conflict with an act of Congress, and therefore void. Constitutionality of the act of Congress making United States treasury notes a legal tender reaffirmed. *Id.*

See APPEAL, 21; COMMERCE, 1; COUNTY RECORDERS, 3; HOMESTEAD, 6; JUSTICE OF THE PEACE, 3, 4; MUNICIPAL CORPORATIONS, 1, 2; OFFICE AND OFFICERS, 1, 5, 6, 7; TAXES, 3, 4, 18.

PROVISIONS CITED:

- Art. I, Sec. 8. Private property, 408.
 Art. II, Sec. 1. Citizen, 386.
 Art. IV, Sec. 17. Amendment of laws, 675.
 Art. IV, Sec. 30. Homestead, 519.
 Art. IV, Sec. 32. Officers, 35, 346.
 Art. IV, Sec. 33. Lieutenant-Governor, 276.
 Art. VI, Sec. 4. Writ of Prohibition, 600.
 Art. VI, Sec. 6. Jurisdiction, 111, 370, 685.
 Art. VI, Sec. 8. Justices of the Peace, 279.
 Art. VI, Sec. 8. Appeals, 686.
 Art. VI, Sec. 18. Officers, 111.
 Art. VIII, Sec. 1. Corporations, 612.
 Art. VIII, Sec. 8. Corporations, 611.
 Art. IX, Sec. 3. Public debts, 223.
 Art. X. Taxes, 614.
 Art. XI, Sec. 2. Public schools, 204.
 Art. XV, Sec. 9. Salary, 276.
 Art. XVII, Sec. 1. District judges, 112.
 Art. XVII, Sec. 2. Territorial laws, 34, 112, 280; Homestead, 518;
 Amendment of laws, 675.
 Art. XVII, Sec. 5. State senators, 276.
 Art. XVII, Sec. 13. County officers, 213.
 Art. XVII, Sec. 24. Taxes, 222.

CONSTITUTION OF UNITED STATES:

- Sec. 8. Power of Congress, 232, 241. Sec. 9. Power of Congress, 238.
 Sec. 10. State authority, 239.

See COMMERCE, 1.

CONSTRUCTION.

HOW LAWS SHOULD BE INTERPRETED.—In interpreting laws, the intention of the legislative body will be carried out, and it will not be lightly presumed that the law-making power contemplated the law should be used as a cloak for fraud and oppression. *Maynard v. Newman*, 228.

CONSTRUCTION OF LAWS PREVIOUSLY INTERPRETED BY OTHER STATES.—

In adopting the practice act of California, it must be presumed to have been adopted as interpreted by the highest court of judicature of that state. *Williams v. Glasgow*, 447; *McLane v. Abrams*, 716.

3. **LAW OF CONGRESS LICENSING CONTRACTS FOR SALE OF GOLD, CONSTRUED.**—The law of Congress approved March 3, 1863, indirectly licensing contracts for the sale of gold, refers to those gold contracts which are not in form technical debts, and must be enforced by action of covenant or assumpsit, with an assessment and judgment for damages. The licensing such contracts does not repeal or modify the law of Congress making United States notes a legal tender for all debts except duties, imposts and interest on the public debt. *Milliken v. Sloat*, 481.
 4. **CONSTRUCTION OF STATUTES—DEBATES OF LEGISLATIVE BODY.**—In cases of doubtful construction, the debates of a legislative body may be resorted to, to determine the meaning of a law. But this only in cases where the language of the law is so ambiguous as not clearly to show the meaning intended to be conveyed. *Maynard v. Johnson*, 549.
 5. **IDEM—INTENTION OF THE LEGISLATURE.**—In interpreting doubtful statutes, the primary object is to ascertain the intent of the legislature. This intent is to be gathered, first, from the language of the statute; next, from the mischiefs intended to be suppressed, or benefits to be attained. *Id.*
 6. **IDEM—WHEN AMBIGUOUS.**—If one clause of a statute is ambiguous, the whole act is to be examined to explain or remove that ambiguity. *Id.*
 7. **IDEM—STAMP ACT.**—*Held*, that the terms "such instrument," in the latter part of section 158 of the stamp act, refers to all unstamped instruments, and that notes issued under the act of June 3d, 1864, not properly stamped were void (overruling former opinion in this case, ante 16). *Id.*
 8. **DOUBTFUL LAWS—HOW CONSTRUED.**—Where the law is doubtful, it is the duty of the court to adopt that construction which will be the least likely to produce mischief and which will afford the most complete protection to all parties, by taking away the power of committing fraud or doing injury. *Arnold v. Stevenson*, 746; *Haydon v. Board of Supervisors*, 877.
 9. **ACT TO CONSOLIDATE INDEBTEDNESS OF ORMSBY COUNTY CONSTRUED.**—In construing this act: *Held*, that the auditor should accept bids of sufficient amount to cover all the money in the fund on the day bids are received. *Haydon v. Board of Supervisors*, 877.
- See **ARBITRATION**, 1; **CONSTITUTION**, 1, 2, 10, 11; **CONTRACTS**, 3; **JURY**, 9; **PLEADINGS**, 4; **PRACTICE ACT**, 2; **STATUTES**, 1, 2, 3.

CONTEMPT.

See **WITNESS**, 3.

CONTINUANCE.

1. **CONTINUANCE WITHIN DISCRETION OF COURT.**—A motion for a continuance is always addressed to the sound discretion of the court, and should not be interfered with except where there has been a manifest abuse of that discretion. *Choate & Brown v. The Bullion Mining Co.*, 62.
2. **CONTINUANCE—WHEN IT OUGHT TO BE GRANTED.**—When a prisoner makes a proper case for continuance, on account of the absence of a material witness, it is error to compel him to go to trial on the admission of the

district attorney that the witness, if present, would swear to the facts as stated by defendant. *State v. Saige*, 832.

- . **IDEM.**—Although the prisoner may not have made out a very clear case for a continuance, still if the court below was of opinion that injustice was done the prisoner because of the absence of his witness, the court was justified in granting a new trial. *Id.*

CONTRACTS.

- 1. **CONTRACTS—COMPOUND INTEREST CANNOT BE ENFORCED.**—It is a settled rule in courts of equity that a contract for future compound interest will not be enforced. Our statute does not sanction compound interest. Contracts, therefore, in regard to compound interest, must stand or fall by the established rules of equity and common law courts. *Cox v. Smith*, 133.
- . **CONTRACTS—VALID CONSIDERATION.**—If A. borrows fifteen hundred dollars in gold from B. when that gold would be worth twenty-five hundred dollars in government paper currency, and gives his note for twenty-five hundred dollars, the note is a valid note with sufficient consideration. *Id.*
- . **CONTRACTS—INTENTION OF PARTIES, GOVERN.**—The intention of the parties to a contract is always the object which is to govern the court in its interpretation, and in ascertaining the rights and obligations of the parties to it. *Van Doren v. Tjader*, 322.
- . **CONTRACTS—WHEN ABANDONMENT PRESUMED.**—When one of the parties to a written contract fails to sign it, the presumption is that he has abandoned it. To overcome such presumption it is necessary for the party relying on the contract to prove that the other party authorized or encouraged him to proceed under the contract. *Keller v. Blasdel*, 413.
- . **CONTRACT—WILL NOT BE ENFORCED UNLESS PURCHASE PRICE IS PAID.**—Whether a vendor's lien as such is or is not assignable, neither the party who contracts to sell land nor his vendee or assignee will be compelled to convey the same to the party who contracted to purchase, until the whole of the purchase price is paid. *Gibson v. Milne*, 440.
- ee **AGREEMENT**, 1; **CONSTRUCTION**, 3; **GUARANTY**, 1, 3; **MINING CLAIMS**, 10; **PLEADINGS**, 8, 9; **PRINCIPAL AND AGENT**; **RELEASE**, 3.

CONVEYANCE.

See **DEED**.

CORPORATION.

- . **CORPORATION—ISSUANCE OF STOCK.**—When a corporation has issued stock to the full number of shares which, by its charter or act of incorporation it is authorized to issue, no court can rightfully direct the issuance of other shares of stock, unless some of the shares issued were void. *Smith v. North American M. Co.*, 357.
- . **CORPORATION, ISSUANCE OF STOCK—MISTAKES, HOW CORRECTED.**—Where all the owners in a mining company transfer their entire interest to trustees to hold the mining ground in trust for the corporation, and to
NEV. DEC.—57

issue stock to the amount of a certain number of shares in lieu of the ground conveyed to them, and said trustees do issue the full number of shares of stock which they are authorized to issue, none of the stock issued is void, although one stockholder may receive more and another less than his just share. The mistake may be corrected by a court of equity by a proper decree, but not so as to make stock void in the hands of an innocent purchaser, nor by ordering the issuance of more stock than the company, by its organization, is entitled to issue. *Id.*

3. CORPORATION—WHEN NOT LIABLE FOR PRIOR INDEBTEDNESS OF A PORTION OF THE STOCKHOLDERS.—When a corporation is formed, the capital or incorporate property of which is composed partly of the property of a pre-existing association and partly of property contributed by corporators who had no connection with the previous association, the corporation is not bound for the debts of the late association. *Paxton v. Bacon Mill & M. Co.*, 768.
4. *Idem.*—The stock of the former associates would be liable for the debts of that association, but the creditors of that association would have no claim on the corporate property, or the stock of those corporators who were not connected with the original association. *Id.*
5. *Idem.*—When there is an agreement between all the parties about to incorporate, that the corporation shall assume all the debts of the prior association; or when, after incorporation, the corporate body assumes all the debts of the old association, this would enable the creditors to maintain *assumpsit* against the corporation. *Id.*

See SUMMONS, 2.

COSTS.

See APPEAL, 20, 22.



COUNSEL FEES.

See MORTGAGE, 5.

COUNTIES.

COUNTY MAY BE SUED.—Section one of "An act prescribing the manner and maintaining actions by or against counties," passed in 1864, authorizes actions to be brought and maintained against counties, and is not merely an act providing where such actions may be brought. *Waits v. Ormsby Co.*, 316.

See COUNTY COMMISSIONERS.

COUNTY COMMISSIONERS.

1. COUNTY COMMISSIONERS—RIGHT OF APPEAL AND OTHER REMEDIES.—Though section twenty-three of the act of 1861, creating boards of county commissioners and defining their duties, authorizes an appeal to the district courts from the decision of the board, it does not take away other modes of procedure provided by statute. It is not unusual to permit several modes of proceeding to obtain the same remedy, leaving it optional with the person seeking it to select either. *Waits v. Ormsby Co.*, 315.

2. **COUNTY COMMISSIONERS—AUTHORITY OF, TO BORROW MONEY.**—County commissioners being creatures of the statute, have no powers beyond those expressly granted by the legislature. The statute not authorizing it, they cannot, therefore, issue a county warrant as collateral security for money borrowed. A warrant so issued would be utterly void. *Id.*
3. **IDEM—MONEY LOANED, HOW COLLECTED.**—Money loaned to the commissioners for the benefit of a county, may be recovered from the county, with legal interest thereon, if it is shown that it was appropriated to the execution of an act which it is made the duty of the commissioners to perform, and the county has received the benefit of it. But nothing can be recovered which is not shown to have been expended for the use and benefit of the county, and for some purpose authorized by law. *Id.*
4. **ACTION AGAINST A COUNTY.**—An action brought to restrain the county commissioners from opening a road is not an action against a county. *Champion v. Sessions*, 404.
5. **WORDS DESCRIPTIO PERSONARUM.**—The words "County Commissioners of Washoe County" following the names of the defendants in an action, are merely *descriptio personarum*, and are not in themselves sufficient to make it an action against the county. *Id.*
6. **COUNTY COMMISSIONERS—RECEIVING BIDS.**—The act creating a sinking fund for Douglas county, and regulating the mode of advertisement for and receipt of bids "until the next regular meeting of the board of county commissioners of said county thereafter," does not authorize the receipt or consideration of a bill filed with the treasurer on the day of the next regular meeting, but at a time subsequent to the meeting and adjournment for that day. *Brumfield v. Commissioners of Douglass Co.*, 588.
7. **IDEM—NOT A COURT.**—The board of county commissioners is not a court, as courts are defined in the Constitution. *Id.*
8. **COUNTY COMMISSIONERS—INJUNCTION.**—When a bill is filed restraining county commissioners from opening a road on the ground that they have not assessed the damages and provided for the payment thereof, it is error to grant a *perpetual* injunction. The commissioners should only be restrained until they have complied with the preliminary requirements of the statute. *Champion v. Sessions*, 781.

See ELECTIONS; INJUNCTION, 1.

COUNTY OFFICERS.

See OFFICE AND OFFICERS.

COUNTY RECORDER.

1. **COUNTY RECORDER—WHEN BOUND TO RECORD INSTRUMENTS.**—The recorder having received fees in advance for recording, indexing, etc., of instruments, was bound to record them himself or procure their recordation by his successor. *Davis v. Thompson*, 17.
2. **IDEM—RIGHTS OF SUCCESSOR IN OFFICE.**—If a newly elected recorder is not strictly bound to record instruments, for the recordation of which his predecessor was paid, it is proper that he should do so in order to conduct the business of his office in an orderly and proper manner. *Id.*

3. **COUNTY RECORDERS, EX OFFICIO AUDITORS.**—The county recorders who, under section 32 of article IV, of the Constitution, become *ex officio* auditors, are those only who are elected under a legislative enactment passed after the adoption of the Constitution. The fact that a recorder is elected after the adoption of the Constitution, but not under a law passed after its adoption, will not entitle him to the position of auditor. *Brown v. Davis*, 346.

COURTS.

1. **PROBATE COURT—ISSUES TRIABLE ON APPEAL.**—The probate court can only try the issues that have been tried in the court below. *Paul v. Armstrong*, 70.
2. **JUSTICE'S COURT OF LIMITED JURISDICTION.**—Courts of justices of the peace being of special and limited jurisdiction, can take nothing by intendment or implication. *Id.* 71.
3. **SUPREME COURT OF THIS STATE SUCCESSOR TO TERRITORIAL SUPREME COURT.**—The supreme court of the state of Nevada is the successor to the supreme court of the territory of Nevada, and has the same control over the records of the late supreme court in all cases where anything remains to be done, that it has over its own records. *Sparrow & Trach v. Strong*, 869.
- See **APPEAL**, 9; **COUNTY COMMISSIONERS**, 7; **DIVORCE**, 1; **FORCIBLE ENTRY AND UNLAWFUL DETAINER**, 3, 4; **JUDGMENT**, 9, 10, 20; **JURISDICTION**, 4, 5, 6; **PLEADINGS**, 3.

CRIMINAL LAW.

1. **JUDGMENT IN A CRIMINAL CASE—WHEN VALID.**—A judgment in a criminal case, showing the parties thereto, the court in which it was rendered, directing the term of imprisonment, the prison in which defendant is to be confined, and reciting the offense for which the prisoner is to be punished, is all the statute requires. *Ex parte Salge*, 379.
2. **PRISONER—HOW HELD IN STATE PRISON.**—The prisoner is held by virtue of the sentence of the court, and the warden needs no other warrant for holding him, except a copy of the judgment or sentence. *Id.*
3. **JUDGMENT OF THE COURT—WHAT CONSTITUTES.**—If a judge, in passing sentence on a criminal, fails to recite all the facts that should be recited in the judgment, but the clerk enters up the judgment on the minutes of the court in due form and with the recitals required by law, that becomes the judgment of the court. *Id.*
4. **JOINT INDICTMENT—ADMISSIBILITY OF WIFE'S TESTIMONY.**—When two parties are jointly indicted but tried separately, the wife of one may be a witness for or against the other, if her husband cannot be benefited or injured by her testimony. *State v. Waterman*, 453.
5. **IDEM.**—When the wife of an accomplice is called, her testimony is entitled at least to the same weight and effect as that of an accomplice. *Id.*
6. **PLEA OF NOT GUILTY—RIGHT OF PRISONER TO WITHDRAW.**—When a prisoner has pleaded "not guilty," it is in the discretion of the court whether or not to allow him to withdraw that plea to interpose another. The prisoner has, however, an absolute right to withdraw that plea to inter-

pose any good defense which has arisen since the last continuance of the case. *State v. Salge*, 831.

See APPEAL, 6; ARSON, 1; CONTINUANCE, 2, 3; EMBRACERY, 1; EVIDENCE, 12, 13, 14; HOMICIDE, 1; INDICTMENT, 1, 2, 3, 4, 5, 6; INSTRUCTIONS, 1, 2, 3, 4, 5, 8, 9, 10, 11, 15; JURY, 1; MANSLAUGHTER, 1; MOTIVE, 1; PRESUMPTIONS, 1; THREATS, 1; WITNESS, 2.

CRIMINAL PRACTICE ACT.

Stat. 1861, page 459, Sec. 234,	Indictment, 833.
Stat. 1861, page 460, Sec. 235, 243,	Indictment, 833.
Stat. 1861, page 462, Sec. 252,	Principal in Crime, 745.
Stat. 1861, page 464, Sec. 275,	Indictment, 430.
Stat. 1861, page 465, Sec. 289,	Judgment on Demurrer, 91.
Stat. 1861, page 472, Sec. 355,	Instructions, 33.
Stat. 1861, page 480, Sec. 423,	Bill of Exceptions, 144.
Stat. 1861, page 480, Sec. 426,	Instructions, 144.
Stat. 1861, page 483, Sec. 450,	Judgment, 382.
Stat. 1861, page 485, Sec. 469,	Appeal, 91, 430.

DAMAGES.

1. UNLIQUIDATED DAMAGES, HOW ASSESSED.—In an action for the recovery of unliquidated damages, where the defendant fails to appear, it is not necessary to call a jury to assess the damages; the court may either hear the proof itself or order a reference for that purpose. One of these modes must, however, be pursued. It is erroneous to render judgment by default without proof in such cases. *Ballard v. Purcell*, 290.
2. MEASURE OF DAMAGES FOR INJURY TO PROPERTY.—Where damages are claimed for depositing a large quantity of earth on the premises of plaintiff, and it is shown that the cost of removing it would exceed the value of the premises, it is error to charge the jury that the sum of money which it would take to remove the earth from the plaintiff's lot is the proper measure of damages. But where the cost of repairing the injury does not exceed the value of the property, such cost will usually be the measure of damage. *Harvey v. Sides S. M. Co.*, 451.
3. TROVER—MEASURE OF DAMAGES.—Ordinarily the measure of damages in trover is the value of the article when converted, together with interest thereon, subject however to some qualifications. *O'Meara v. North American M. Co.*, 633.
4. EQUITY TO COMPEL DELIVERY OF MINING STOCK—MEASURE OF DAMAGES.—Where the proceeding is in equity to compel the delivery of stock, and the defendant is unable to deliver it, the alternative decree should be for the value of the stock at the time of the trial. *Id.*

See APPEAL, 2, 3; EJECTMENT, 3; FORCIBLE ENTRY AND UNLAWFUL DETAINER, 9; PLEADINGS, 9.

DEATH.

1. DEATH OF DEFENDANT AN ISSUABLE FACT.—Where the death of one of the defendants is put in issue by the pleadings, it should, like every other issue of fact, be left to the jury. *Fowler v. Houston*, 398.

2. **FORECLOSURE OF MORTGAGE—DEATH OF PARTY TO.**—Where the wife, who has no interest in the premises, and who was dead at the time of bringing an action to foreclose a mortgage, is made defendant with her husband, the proper practice upon her death being suggested, would be to strike out her name, and allow the plaintiff to proceed against her husband. *Id.*
3. **DEATH OF JOINT CONTRACTOR.**—Where one of several joint contractors dies, the survivors may be proceeded against without uniting the representatives of the deceased. *Id.*

DEBT.

See CORPORATION, 3, 4, 5; TAXES, 13, 14, 15.

DEED.

1. **DEED CARRIES LEGAL TITLE TO GRANTEE.**—A deed of conveyance, executed and delivered, carries the absolute legal title to the grantee, and if more land is by mistake conveyed than was intended by the grantor, it carries the legal title to that portion not intended to be conveyed, as well as that which it was the intention to convey, leaving, however, an equitable interest to that not intended to be conveyed in the grantor. *Ruhling v. Hackett*, 308.
2. **TRUST DEED—WHEN MAY BE REVOKED.**—When a deed is made in trust for the benefit of creditors, and they refuse to accept its terms, the party making the conveyance may revoke it. *Gibson v. Chedic*, 419.
See EQUITY, 4, 9, 10, 11, 14; EXECUTION, 7, 8; MORTGAGE, 3, 4.

DEFINITIONS.

MEANING OF WORDS "IMPORTS" AND "EXPORTS."—The words "imports" and "exports," as used in the Federal Constitution, include property only, and do not extend to individuals. *Ex parte Crandall*, 251.

See MINING CLAIMS, 1.

DELIVERY.

See SALE, 1, 2, 3.

DEMAND.

See ESTATES UPON CONDITION, 4; FORCIBLE ENTRY AND UNLAWFUL DETAINER, 1, 8.

DEMURRER.

See APPEAL, 6, 12; PLEADINGS, 5, 7, 11; PRACTICE, 1.

DEPOSITION.

1. **DEPOSITION—SUFFICIENCY OF COMMISSION.**—A commission to take a deposition, authenticated by the certificate of the clerk, under the seal of the court and issued in pursuance of a former order of the court, is sufficient authority for taking the testimony of a witness. *Smith v. North American M. Co.*, 357.
2. **DEPOSITIONS USED IN DIFFERENT CASES—HOW TAKEN.**—When two cases are pending in the same court, between the same parties, a deposition may

be taken upon one notice, affidavit, and commission, to be read in both cases. *Scott v. Bullion M. Co.*, 685.

1. **IDEM.**—A deposition taken in one case may be used between the same parties in another; so a deposition entitled in two cases between the same parties may be used in either. *Id.*
2. **IDEM—WHEN TAKEN TWICE.**—Where the deposition of the same witness is taken twice, and it appears that the first examination covered the whole ground of controversy, and was regularly taken, the court might refuse to hear the second deposition. But the regular method would be to appear and contest the issuance of the second commission. *Id.*

DESCRIPTIO PERSONARUM.

See COUNTY COMMISSIONERS, 5.

DISCRETION.

See CONTINUANCE, 1.

DISTRICT ATTORNEY.

DISTRICT OR PROSECUTING ATTORNEYS.—"District Attorney" and "Prosecuting Attorney:" *Held*, synonymous terms. *State v. Salge*, 831.

See INDICTMENT, 7.

DRUNKENNESS.

See JURY, 2.

DIVORCE.

ALIMONY PENDENTE LITE—NOT ALLOWED AFTER FINAL JUDGMENT AGAINST THE APPLICANT.—Under the statute providing for the payment of alimony *pendente lite*, the court cannot make an order for the payment of past expenses after the suit has been finally decided against the wife. *Wilde v. Wilde*, 816.

EJECTMENT.

1. **EJECTMENT—WHAT DEFENDANT MAY SHOW.**—It is competent for a defendant in ejectment to show as a defense that prior to the bringing of the action the plaintiff had conveyed away his title to the premises, or that his grantor had done so prior to the conveyance by which plaintiff claims. *Mallett v. Uncle Sam G. & S. M. Co.*, 157.
2. **IDEM.**—A mere naked trespasser cannot show outstanding title in a third party, except as a means of showing the want of all title or right of possession in the plaintiff. *Id.*
3. **EJECTMENT—ACTUAL DAMAGES NEED NOT BE PROVEN.**—In an action of ejectment it is not necessary for the plaintiff to prove that he has suffered actual damage by the ouster of defendant. *Dilley v. Sherman*, 591.
4. **IDEM—RIGHT OF POSSESSION.**—*Held*, that to entitle plaintiff to recover in an action of ejectment, it was only necessary to prove title and immediate right of possession in himself, and the occupancy by defendants of the premises described when suit was brought. *Id.*
5. **EJECTMENT—RIGHTS OF PARTIES TO THE SUIT.**—If a plaintiff, pending a suit in ejectment against several defendants, each in possession of dis-

- inct parts of the property sued for, sells out to one of the defendants, the controversy as to that defendant is ended, and he may under his purchase prosecute the same suit against the other defendants for such portion of the property as they hold. *Bullion M. Co. v. Crossus M. Co.*, 687.
6. **IDEM—AMENDMENT OF COMPLAINT.**—In such case the purchaser, being substituted as plaintiff, cannot amend his complaint so as to include other property claimed by himself under a different title. *Id.*
 7. **IDEM—STATUTES OF LIMITATION.**—When an action has been brought in due time for one piece or portion of property, it would be bad practice to allow the complaint to be so amended as to include another piece of property which would otherwise be protected from recovery by the statute of limitations, and thus embarrass the defense under that statute. *Id.*
 8. **IDEM—JUDGMENT FOR UNDIVIDED PORTION OF LAND.**—When an undivided portion of a tract of land is recovered, the sheriff would not be justified in entirely expelling the tenants who are in possession, if they make no opposition to a joint or common possession by those recovering the judgment. *Id.*
 9. **IDEM—TENANTS IN COMMON MAY UNITE IN BRINGING SUIT.**—All tenants in common, under our statute, may unite in prosecuting an action for possession of the common property. So one tenant in common may sue for his share. *Id.*
 10. **IDEM—SUIT TO RECOVER A BLIND LODGE.**—When a suit is brought for a blind ledge bounded by walls found at the depth of two hundred feet below the surface, the ledge only and no part of the surface can be recovered. *Id.*

See MINING CLAIMS, 11, 12; PLEADINGS, 1; POSSESSION, 1, 2; TENANT IN COMMON, 4.

ELECTION.

1. **ELECTION, WHEN HELD.**—Under our form of government there is no inherent right in the people to hold an election to fill any office. An election can only be held by virtue of some constitutional provision or legal enactment, either expressly or by direct implication, authorizing that particular election. *Sawyer v. Haydon*, 64.
2. **IDEM—VACANCIES IN OFFICE.**—A law authorizing the electors of a county biennially to elect a person to fill a certain office, does not, even by implication, authorize them at an intermediate election to choose a person to fill out an unexpired term of the same office; especially is this so where there has been an appointment made to fill the vacancy by legal authority, and there is no law limiting this appointment to a period short of the expiration of the unexpired term. *Id.*
3. **ELECTIONS, WHEN TO BE HELD.**—An election cannot be held for an office at a time not fixed by law for such election. *State v. Collins*, 859.
4. **IDEM.**—The phrase, "next general election," in the nineteenth section of "An act to create a board of county commissioners," etc., (Stat. 1864-5), means the general election on alternate years, commencing with 1864, and has no reference to the election of 1865, which is in some

respects to be held as a special election interpolated on the general system of biennial elections. *Id.*

See OFFICE AND OFFICERS, 2.

EMBRACERY.

ATTEMPT TO COMMIT EMBRACERY.—There is no such crime known to the law as an *attempt* to commit embracery. Embracery is itself but an attempt to do a wrong. *State v. Sales*, 778.

EQUITY.

1. **EQUITY—KNOWLEDGE OF, HOW ASCERTAINED.**—When M. and F. act jointly in making a purchase of land, and F. has full knowledge of the nature and character of an equity which R. holds in the land purchased, and M. knows that R. asserts *some* equity, but does not know the nature, character, or extent of the equity claimed, nor the justice of its foundation, still both will be held to have purchased with full knowledge, for M., having heard of the claim of an equity and having failed to inform himself when having the opportunity to do so, is in no better condition than if fully informed. It is not in such case using due diligence to rely solely on the assertion of the vendor of the land that R. has no equity. *Crozier v. McLaughlin*, 296.
2. **PARTY IN POSSESSION—LEGAL OR EQUITABLE TITLE OF.**—It is immaterial when a party in possession files his bill claiming that he is a tenant in common with others, asking for a division of the land, etc., whether he shows that he has a legal title in common with the defendants, or only has an equitable title to the one-half of the land described. In either case he is entitled to substantially the same relief. *Id.* 297.
3. **EQUITY—WHEN PARTY NOT ENTITLED TO A JURY.**—When a party files a complaint for equitable relief, and the whole case shows it must be determined rather upon the application of legal principles to admitted facts, than on the determination of controverted facts, the case should not be submitted to a jury. *Id.*
4. **DEED—POWER OF COURTS OF EQUITY TO CORRECT MISTAKES.**—Courts of equity have the power to correct mistakes in deeds and other executed instruments, so as to make them conform to the real intention of the parties, even to the extent of making a deed include more land than is embraced in it, where it was omitted by mistake, fraud or surprise. *Ruhling v. Hackett*, 308.
5. **COURTS OF EQUITY—ADEQUATE REMEDY AT LAW.**—In cases of this kind, where a complete and adequate remedy can be had at law, a court of equity will not interfere; but on the other hand, if the injury is likely to be irreparable, or if the defendant be insolvent, equity will always interpose its power to protect a person from a threatened injury. *Champion v. Sessions*, 404.
6. **DECREES IN EQUITY—CONFINED TO PLEADINGS.**—In equity no decree can be made in favor of a party upon grounds not set forth in the pleadings. *Low v. Blackburn*, 593.
7. **EQUITABLE AND LEGAL DEFENSES—HOW TRIED.**—When there are two distinct defenses, it is not the proper practice to impanel one jury to try

- the equitable defense, and another the legal defense. It is, however, proper to keep the two defenses separate. The judge, himself, may first hear and determine the equitable side of the case; or, if in doubt, he may submit special issues to the jury who are to try the law side of the case. *Low v. Crown Point*, 599.
8. **COURTS OF EQUITY—DUTY OF.**—Courts of equity should allow a reasonable delay and indulgence to enable the parties to establish their rights instead of depriving parties of their substantial rights for a mere technical error or omission. *O'Meara v. North American M. Co.*, 633.
 9. **DEED—SPELLING NAME WRONG.**—A party executing a deed cannot avoid it because he spells his name wrong in signing it. *Id.*
 10. **TRUST DEED—EQUITABLE DEED AND RIGHTS OF GRANTEE.**—When one deeds all his interest in a mining company to trustees, and afterwards conveys the same feet with covenants of warranty to another party, the last grantee takes an equity, and is entitled to the shares to be issued in lieu of these feet. *Id.*
 11. **IDEM—ISSUANCE OF MINING STOCK.**—When trustees of a mining company issue stock to the party equitably entitled, the court will not compel them to issue to another, especially when that other can only show his claim by establishing his own fraud. *Id.*
 12. **EQUITY—WILL REMOVE CLOUD UPON TITLE.**—Courts of equity independent of the statute might, in a proper case, remove a cloud from title. *Low v. Staples*, 723.
 13. **IDEM.**—Courts of equity will always interfere to protect one from the operation of a deed which is void, or from some cause ought not to be enforced, unless the deed is void on its face, when there is no necessity for such interference. *Id.*
 14. **IDEM—LOST DEED—POSSESSION OF PROPERTY.**—Where the possession of the realty is in a corporation holding for the benefit of the original owners and assignees, and willing to recognize the right of whoever holds the proper assignment or transfer of the property, it is not necessary to bring an action at law preliminary to the establishment of a lost deed, and the removal of a cloud. *Id.*
- See CORPORATION, 2; DAMAGES, 4; DEED, 1; ESTATES OF DECEASED PERSONS, 5, 6, 7; INJUNCTION, 1; JUDGMENT, 18, 20; MORTGAGE, 9; QUIETING TITLE, 1; TENANT IN COMMON, 3.

ERROR.

1. **ERROR—WHEN IMMATERIAL.**—When a court errs in rejecting testimony, but after further proof and explanation admits the testimony, the former error becomes immaterial and is no ground for reversing the judgment. *Smith v. North American M. Co.*, 357.
2. **ERROR MUST AFFIRMATIVELY APPEAR.**—This court cannot reverse a judgment unless it affirmatively appear that error has been committed. *Nesher v. Hayes*, 576; *Champion v. Sessions*, 781; *Mitchell v. Bromberger*, 855.
3. **ERRORS TO JUSTIFY REVERSAL MUST BE PREJUDICIAL.**—The judgment of an inferior court will not be set aside on appeal, for errors committed on the trial which it appears could not have prejudiced the appellant. *Mitchell v. Bromberger*, 855.

See JUDGMENT, 33, 34; STATEMENT, 5.

ESTATES UPON CONDITION.

- . ESTATES UPON CONDITION—WHAT CONSTITUTES.—Where a written agreement is entered into by which, upon certain terms and conditions, the parties of the second part are permitted to erect a steam quartz mill on the premises of the party of the first part; and it is made the duty of the party of the second part to erect the mill within a certain time, and among other things to pump the water from the mine of the parties of the first part, it gives the parties of the second part an estate upon condition in the premises. *Hamilton v. Kneeland*, 37.
- . IDEM.—No precise words are required to create a condition. The intention of the parties, which is to be gathered from the whole instrument and the subject-matter to which it relates, must determine the question. *Id.*
- . IDEM.—COMMON LAW RULE NOT RECOGNIZED.—The common law rule, that a condition cannot be reserved to any but the grantor and his heirs, has not been recognized as the law in this country. *Id.*
- . ESTATE UPON CONDITION—ACTUAL ENTRY—DEMAND OF POSSESSION.—Upon a breach of a condition upon which an estate is held, an actual entry is not necessary to defeat the estate; a demand of possession is sufficient. *Id.*

ESTATES OF DECEASED PERSONS.

- . ESTATES OF DECEASED PERSONS—EXPENSES OF ADMINISTRATION.—The percentage allowed by law to administrators, for collecting and disbursing money, is one of the expenses of administration which should be allowed in preference even to funeral expenses. *Estate of Nicholson*, 433.
- . IDEM.—ATTORNEYS' FEES.—Attorneys' fees may or may not be properly charged among the expenses of administration, according to the particular circumstances of the case. *Id.*
- . IDEM.—INSURANCE.—Insurance paid by an administrator on the property of a decedent ought to be allowed as one of the expenses and charges of administration. But if money be paid for insurance under circumstances showing recklessness and want of proper care and prudence, the court may properly refuse to allow it. *Id.*
- . ESTATES OF DECEASED PERSONS—SUIT ON ALLOWED CLAIMS.—Our statute in regard to probate matters does not prohibit bringing suit on an allowed claim, but simply denies the plaintiff costs if he recovers no more than the administrator was willing to allow. (LEWIS, C. J., *dissenting*.) *Corbett v. Rice*, 840.
- . IDEM.—JURISDICTION OF COURTS.—When others than the defendant are necessary parties to a foreclosure suit, the proceeding cannot be in the probate court, but must be in equity. *Id.*
- . IDEM.—When only the mortgagee and the representative of the deceased mortgagor are necessary parties, the probate court and equity courts have concurrent jurisdiction. *Id.*
- . IDEM.—In those cases where a probate court has jurisdiction and can administer full relief, it is in the discretion of a court of equity to assume jurisdiction, or turn the parties over to the probate court. And if a

court of equity proceeds with the foreclosure, it has the right either to allow or refuse costs to the mortgagee. *Id.*

See LIMITATIONS, 8, 9.

ESTOPPEL.

See MINING CLAIMS, 2.

EVIDENCE.

1. EVIDENCE—VERDICT AND JUDGMENT, WHEN TO BE GIVEN IN EVIDENCE.—To entitle a verdict and judgment thereon to be given in evidence, it must be between the same parties or privies, and upon the same point; except where the verdict or judgment is upon the subject of a public nature, such as customs and the like. *Geller v. Huffaker*, 22.
2. *IDEM.*—The only facts which a verdict establishes are those which are necessary to support it, and upon which issues has been joined. *Id.*
3. *IDEM.*—If a complaint contain several counts or several distinct grounds, upon either of which a recovery could be had, and the general issue is pleaded, a general verdict and judgment thereon in such a case could not be given in evidence to establish all the grounds upon which plaintiff claimed the right to recover. *Id.*
4. PAROL EVIDENCE, WHEN ADMISSIBLE TO CORRECT MISTAKES IN WRITTEN INSTRUMENT.—Parol evidence cannot be admitted to supply, contradict, vary or enlarge the words of a written contract, except in a proper proceeding to correct a mistake in the drafting of the instrument. *Travis v. Epstein*, 94.
5. *IDEM.*—But parol evidence may be admissible to prove the making of a separate and distinct parol contract at the same time a written contract is made. *Id.*
6. EVIDENCE ADMISSIBLE TO SHOW MISTAKE.—The agreement between the parties, and the circumstances attending the settlement may be introduced, with other facts and circumstances, to show mistake. *Id.*
7. EVIDENCE—DECLARATION OF VENDOR.—The declaration of a partner or part owner in a mill which is building, who deeds his interest in the real estate to his partner, but continues in possession, controlling the property just as before the deed was made, may be taken in connection with his continued possession and control of business to show his continued interest in the property. *Gregory v. Frothingham*, 211.
8. *IDEM.*—The declarations of a vendor, made before the sale, of his intention to make a transfer to delay his creditors, will be taken as evidence of his intention in making a sale, but a knowledge of that intention must be brought home to the vendee to avoid the sale. *Id.*
9. *IDEM.*—TO ESTABLISH FRAUD.—To establish fraud the motives and intentions of the parties to the transaction may be proven. *Id.*
10. EVIDENCE—OBJECTIONS TO MUST BE MADE IN THE COURT BELOW.—The failure of the plaintiff to prove the correctness of his book account, or that the entries were made at or about the time of the transaction, cannot be taken advantage of for the first time on appeal. If the point be not made in the lower court, it will not be passed upon in the appellate court. *Carpenter v. Johnson & Waddell*, 281.

1. **ACTION FOR MONEY ADVANCED—EVIDENCE IN.**—The opinion decides what proof was admissible under the facts of this case. *Huguet v. Owen*, 395.
 2. **ALIBI—EVIDENCE, WHEN SUFFICIENT TO ESTABLISH.**—When the defendant attempts to establish an *alibi*, which if established would show the impossibility of his connection with the offense charged, he takes on himself the affirmative of the proof. But it is not necessary he should establish his defense by preponderating evidence. It is sufficient if his evidence is such as to raise a reasonable doubt whether he was present at the place where the offense was committed, or at a different place, and one which was inconsistent with the possibility of his guilt. *State v. Waterman*, 454.
 3. **EVIDENCE DIVIDED INTO THREE CLASSES.**—Evidence in regard to its credibility or the degree of conviction which it must produce may be divided into three classes; First. That which establishes a fact beyond *all reasonable doubt*. Second. That which establishes a fact by preponderating evidence. Third. That which only renders it probable that a fact may exist, or, in other words, *reasonably doubtful* if it does not exist. *Id.*
 4. **IDEM—SUFFICIENCY OF EVIDENCE FOR DEFENSE.**—When a defendant in a criminal case asserts, by way of defense, the existence of any fact which is physically incompatible with his guilt of the crime charged, it is sufficient to entitle him to an acquittal, if his evidence in support of that fact reaches only the third class. *Id.*
 5. **NOTICE TO PRODUCE PROMISSORY NOTE.**—Upon notice to defendant who is in possession of note sued on, to produce the same, and failure on his part, plaintiff may prove contents. *McClusky v. Gerhauser*, 271.
 6. **CONSTABLE'S CERTIFICATE OF SALE—MAY BE ATTACKED.**—It may be proved in a collateral proceeding that certain property was not actually sold by a constable at a judicial sale, notwithstanding the constable's certificate of sale. *McDonald v. Prescott*, 629.
 7. **EVIDENCE TO CONTRADICT RECORD.**—Oral evidence is never admitted to contradict the record, or to show error in the court rendering a judgment. *Ex parte Smith*, 848.
- see ASSUMPSIT, 4; ATTORNEY, 1; BILLS AND NOTES, 3; CRIMINAL LAW, 4, 5; FINDINGS, 2; INSTRUCTIONS, 3; MINING CLAIMS, 7; NEW TRIALS, 1, 2; PARTNERSHIP, 5, 6, 7; PLEADINGS, 25; STATEMENT, 6.

EXECUTION.

1. **EXECUTION MUST BE AUTHORIZED BY THE JUDGMENT.**—The execution must be authorized by the judgment, and must follow it in every essential particular, not only as to material matters of form, but also as to the amount for which it is rendered. *Hastings v. Johnson*, 523.
2. **IDEM—WHEN SALE UNDER EXECUTION WILL BE SET ASIDE.**—If the execution is issued for an amount materially in excess of the judgment, a levy and sale made to satisfy such excess is nugatory and will be set aside upon the application of any person interested, or whose rights have been prejudiced thereby. *Id.*
3. **IDEM.**—When but one sale of property is made under such an execution and an amount materially exceeding the judgment is realized, the entire

proceedings under it are nugatory. But when several levies and sales are made for separate sums, only such sales or levies will be considered void are made to satisfy the amount in excess of the judgment. *Id.*

4. **IDEM.**—When the discrepancy between the judgment and the execution is a mere trifle, levy and sale will not be disturbed, but when it is material it cannot be overlooked. *Id.*
5. **IDEM.**—Only the original claim or demand draws interest after judgment. When, therefore, an execution is issued directing the collection of interest on the interest included in the judgment, and a sale of property is made to satisfy such excess of interest, the sale is nugatory, even against a *bona fide* purchaser. *Id.*
6. **OFFICER—JUSTIFICATION OF, UNDER AN EXECUTION.**—An officer may justify in some cases under an execution alone. But under other circumstances, as when the controversy is with a purchaser whose title is only defective for want of a delivery, the officer must show the judgment as well as the execution. *McDonald v. Prescott*, 629.
7. **EXECUTION—DATE OF JUDGMENT—RECITALS IN SHERIFF'S DEED.**—One who brings an action to recover real estate purchased under execution cannot show that the execution issued under a different judgment than the one recited on its face, nor can he contradict the recitals in the deed under which he claims. *Zabriskie v. Meade*, 793.
8. **RECITALS IN DEED.**—If a defendant in execution has no title to premises in question, either at the date of sale, or at any time subsequent to the period when the judgment was rendered, as appears by the recitals in the execution, in the advertisement of sale, in the certificate of sale and the sheriff's deed, a party claiming under such execution sale will not be allowed to show that the true date of the judgment under which the execution was issued was different from all those recitals. *Id.*

See JUDGMENT, 23; STIPULATION, 1.

EXPORTS.

DEFINITIONS, 1.

FEEES.

FEES—COLLECTION OF, IN ADVANCE.—If a county recorder makes a request for advance payment of his fees for receiving, filing and recording instruments, and the request is voluntarily complied with, it does not make an illegal transaction, but it is the legitimate collection of money for services to be rendered. *Davis v. Thompson*, 17.

See ATTORNEYS, 1, 2.

FINDINGS.

1. **FINDINGS—WHEN EXCEPTIONS TO, MUST BE TAKEN.**—A defective finding of facts is not a ground for reversing a judgment when that defect is not noticed or complained of in the court below. *McCluskey v. Gerhauser*, 521.
2. **FINDINGS OF COURT UNSUPPORTED BY EVIDENCE.**—When a case is tried before a court without a jury, and one of the facts found by the judge, and the very one on which the case, in his opinion, turns, is wholly unsupported by the evidence, this court will not treat this particular find-

ing as surplusage, in order to sustain the judgment on other findings, but will reverse the judgment. *Lockhart v. Mackie*, 804.

See APPEAL, 20; PLEADINGS, 20, 21.

FORCIBLE ENTRY AND UNLAWFUL DETAINER.

1. **FORCIBLE ENTRY AND UNLAWFUL DETAINER—DEMAND FOR POSSESSION MUST BE MADE.**—A demand of possession must be made by the landlord before bringing suit against his tenant for holding over. *Paul v. Armstrong*, 71.
2. **IDEM—JUDGMENT OF CONFESSION NOT AUTHORIZED.**—Judgment upon confession cannot be entered in a justice's court in an action for forcible entry and unlawful detainer. *Id.* (*Per Brosnan, J.*)
3. **WRIT OF RE-RESTITUTION, POWER OF COURT TO GRANT.**—The probate court has the power to issue a writ of re-restitution, in an action of forcible entry and unlawful detainer, brought before it on *certiorari*. *Id.*
4. **JURISDICTION OF ACTION OF FORCIBLE ENTRY AND UNLAWFUL DETAINER.**—Though the Constitution of the State confers the jurisdiction of cases of forcible entry and unlawful detainer on the district courts, the courts of justices of the peace continue their jurisdiction of such cases until the organization of the district courts under the State authority. *Armstrong v. Paul*, 109.
5. **FORCIBLE ENTRY AND DETAINER—JURISDICTION OF DISTRICT COURT.**—The Constitution confers jurisdiction on the district courts to hear and determine actions of forcible entry and detainer without any special legislative enactment on the subject. *Hoopes v. Meyer*, 366.
6. **IDEM—FORFEITURE.**—The forcible entry act, so far as the same defines forfeitures, etc., is in force. That part of it which directs what court shall assume jurisdiction is suspended and altered by the Constitution. *Id.*
7. **REPEAL OF LAW—EFFECT OF.**—The repeal of the act takes away the right to impose a fine for its violation but does not deprive parties of their rights acquired by contract under the law whilst it was in existence. *Id.*
8. **DEMAND FOR RENT, HOW MADE.**—Our statute does not require a demand for rent to be made on the premises at a late hour of the day the same falls due in order to produce a forfeiture of the premises rented. The only demand required is the written demand for the money, which must be made after the rent has been three days due. *Id.*
9. **FORCIBLE ENTRY AND UNLAWFUL DETAINER—TREBLE DAMAGES.**—The question of damages in actions of forcible entry and unlawful detainer discussed: *Held*, that there can be no treble damages. *Id.*

FORFEITURE.

See ABANDONMENT, 3; FORCIBLE ENTRY AND UNLAWFUL DETAINER, 6; MINING CLAIMS, 4; ROADS, 2.

FRAUD.

See ATTACHMENT, 6; EQUITY, 4; EVIDENCE, 9; MORTGAGE, 11.

GOLD COIN.

See CONSTITUTION, 10, 11; JUDGMENT, 7, 19.

GRAND JURY.

See INDICTMENT, 3, 5, 6.

GUARANTY.

1. **CONTRACTS OF GUARANTY MUST BE IN WRITING.**—The contract of guaranty to be effectual must be in writing, and must express *the* consideration upon which it is based. Where, therefore, a stranger to a promissory note indorses it in blank at the time of its execution, though he be a guarantor of the note, yet he cannot be holden upon it where there is no such contract in writing expressing the consideration for his undertaking. *Van Doren v. Tjader*, 322.
2. **GUARANTOR OF NOTE—WHAT NOTICE ENTITLED TO.**—A guarantor of a promissory note will not be discharged by the failure of the holder to demand payment and give strict notice of non-payment. Reasonable notice of the dishonor of the note is all that he is entitled to. *Id.*
3. **CONTRACT OF GUARANTY MUST EXPRESS CONSIDERATION.**—A contract of guaranty, though made at the time of the principal contract and upon the same consideration, must, nevertheless be in writing, signed by the party to be charged, and must express the consideration which sustains it. *Id.*
4. **CONSIDERATION AND PROMISE.**—The promise to answer for the debt of another and the consideration for that promise, need not be contained in the same paper, provided the signature of the grantor can be connected with both. A note imports consideration to the maker, but it does not import a consideration for a guaranty of its payment by a third party. *Id.*
5. **GUARANTY, WRITING MUST SHOW CONSIDERATION.**—The intent of the statute of frauds seems to be that the writing itself, without extraneous evidence should show the consideration for the guaranty. *Id.* 323.

HABEAS CORPUS.

1. **SECTION TEN OF HABEAS CORPUS ACT CONSTRUED.**—*Held*, that under this act, the return should fully state why the prisoner is detained, and if there is any written authority for the detention, a copy thereof should be set forth in the officer's return, in addition to the general statement of the cause of the detention. *Ex parte Salge*, 379.
2. **HABEAS CORPUS—COMMITMENT, WHEN SUFFICIENT.**—A regular commitment, under the seal of the court, properly attested, reciting all the material facts of the judgment, is sufficient to authorize the warden of the state prison to hold the prisoner. *Ex parte Smith*, 648.
3. **IDEM—WHAT WILL NOT BE REVIEWED.**—*Habeas corpus* is not the proper writ to review the decisions of a court and correct its errors or amend its irregularities. *Id.*

See PARDON, 2, 3.

HOMESTEAD.

1. **HOMESTEAD—WHAT IT INCLUDES.**—The law exempts from forced sale a tract of land on which the homestead is located to the extent of five ~~thousand~~ dollars in value, and does not limit or prescribe the other uses

to which the land may be put if one use it for a homestead. It makes no difference that the land is divided by imaginary lines. The entire tract of land, if not exceeding five thousand dollars in value, is protected. *Clark v. Shannon*, 447.

2. **IDEM—MORTGAGE UPON, MUST BE EXECUTED BY HUSBAND AND WIFE.**—When the homestead tract of land does not exceed five thousand dollars in value, the husband cannot execute a mortgage on any portion thereof without the concurrence of the wife. *Id.*
3. **HOMESTEAD—HOW DEDICATED.**—Erecting a house and residing therein with one's family dedicates that building as a homestead. It makes no difference that the house erected is large or suitable for a lodging house and used for such purpose. *Goldman v. Clark*, 516.
4. **IDEM—HOW DIVESTED.**—Being once dedicated as a homestead, it can only be divested of that character by the joint deed of husband and wife. *Id.*
5. **IDEM—CLAIM OF, HOW MADE.**—The statute which requires the owner of the property to make his claim of homestead is merely directory, and if the husband does not make such claim and point out the homestead property to the officers when it is levied on, the wife may do so. *Id.*
6. **IDEM—RIGHTS OF WIFE.**—The Constitution and the law have given the wife certain rights; the failure of the legislature to point out the particular manner in which she shall assert them, is immaterial. She may come into a court of equity according to the established forms and usages of that court, and obtain any equitable relief to which she is entitled. *Id.*

HOMICIDE.

- MURDER—INSTRUCTIONS.**—The court gave the following instruction: "If the jury find from the evidence that James Kelly, on or about the time alleged in the indictment, received a mortal wound of which he died, in Storey county, within a few days thereafter, caused by a shot from a pistol in the hands of defendant, and that said pistol was discharged accidentally; yet if they find that defendant was exhibiting said pistol in a rude, angry and threatening manner, and not in necessary self-defense, and that such act in its consequences naturally tended to destroy the life of a human being, then they may find defendant guilty of murder." *Held*, correct. *State v. Kelly*, 188.

See MANSLAUGHTER, 1.

IMPOST.

See DEFINITIONS, 1.

INDICTMENT.

1. **INDICTMENT—STATUTORY OFFENSES, HOW STATED.**—An indictment should charge a statutory offense in the words of the statute creating it, or in words of similar import. *People v. Logan*, 89.
2. **IDEM.**—The crime must be directly and positively charged and not argumentatively. The want of a direct allegation of anything material to the description of the substance, nature or manner of the offense, cannot be supplied by any intendment or implication whatever. *Id.*

3. **INDICTMENT—WHEN SHOULD NOT BE QUASHED.**—An indictment should not be quashed merely because the grand jury received some illegal or incompetent testimony. If there is any legal testimony to sustain it, it should not be set aside. *State v. Logan*, 427.
4. **IDEM—WHEN MAY BE SET ASIDE.**—If there is nothing to support the bill but evidence clearly incompetent and which would not be admissible at the trial, as the testimony of a person rendered incompetent by conviction of an infamous crime, the indictment may be set aside on motion before plea. *Id.*
5. **IDEM—TESTIMONY OF GRAND JURORS INADMISSIBLE.**—But to authorize the setting aside of an indictment, even where there is no competent evidence to support it, that fact must appear by proof, independent of the testimony of the grand jurors who found the bill, for it is inadmissible for them to show that the indictment was found without testimony or upon insufficient testimony. *Id.*
6. **IDEM.**—Grand jurors may be called to testify against a witness who is indicted for perjury, to prove what was sworn to before them, or to show that the indictment is not found by the requisite number, but the testimony of a grand juror cannot be received to impeach or affect the findings of his fellows. *Id.*
7. **INDICTMENT—NEED NOT BE SIGNED BY DISTRICT ATTORNEY.**—There is no statute requiring a district attorney to sign an indictment. *State v. Salge*, 831.

See JUDGMENT, 15.

INJUNCTION.

INJUNCTION—WHEN IT WILL BE ISSUED.—The legislature has an undoubted right to confer upon the county commissioners power to open roads, upon a proper compensation being made to those whose property is taken for such purpose, but until such compensation is made, there is no power within the state which can legally appropriate the property of the citizen, except in certain cases mentioned in section 2, article 1, of the state constitution. *Champion v. Sessions*, 405.

See APPEAL, 13; COMMISSIONERS, 8.

INSTRUCTIONS.

1. **INSTRUCTIONS—CRIMINAL LAW—WHEN REASONS FOR REFUSING INSTRUCTIONS SHOULD BE GIVEN.**—When a defendant in an indictment for murder asks for an instruction which is clearly law, the court should give it although the same legal proposition may be substantially set out in another instruction given by the court. At least, if such instruction is refused in presence of the jury, the court must state it is only refused because already given, substantially, in another instruction. *People v. Bowles*.
2. **IDEM—COURT CANNOT INSTRUCT THE JURY AS TO THE FACTS.**—Where an instruction asked by defendant assumes the existence of a fact not admitted by the prosecution, the court should refuse to give it in that form. *Id.*
3. **IDEM—EVIDENCE—WEIGHT OF, DETERMINED BY THE JURY.**—It is error in the court to state, in the presence of the jury, that the argument of

counsel in regard to facts in the case is not tenable; that there is no evidence to support the hypothesis of counsel. The weight of evidence and its effect in proving secondary facts is to be determined by the jury. *Id.*

4. **ORAL INSTRUCTIONS CANNOT BE GIVEN EXCEPT BY CONSENT.**—The court cannot give any instruction verbally, unless the prisoner assents, and that assent must affirmatively appear. *Id.*
5. **REMARKS OF COURT, WHEN EQUIVALENT TO AN INSTRUCTION.**—A remark made by the presiding judge, in the hearing of the jury, has precisely the same effect as if given as a formal instruction. *Id.*
6. **INSTRUCTIONS—GENERAL RULE OF LAW—EXCEPTIONS.**—When a court is laying down a general rule of law, it is not improper to notice exceptions to the general rule or such circumstances as will prevent its operation. *People v. Gleason*, 143.
7. **INSTRUCTIONS PART OF THE RECORD.**—Instructions which are filed with the indorsement of the judge are a part of the record, and the action of the court thereon may be reviewed without any formal bill of exceptions. *Id.*
8. **INSTRUCTION—GOOD CHARACTER OF DEFENDANT.**—An instruction that "the good character of the defendant could only be taken into consideration when the jury have reasonable doubt as to whether the defendant is the person who committed the offense with which he is charged:" *Held*, correct. *Id.*
9. **IDEM—INVOLUNTARY MANSLAUGHTER.**—It was not error in the court below, after defining involuntary manslaughter, to add: "The drawing of a deadly weapon, in a rude, angry and threatening manner, not in necessary self-defense, is an unlawful act within the meaning of our statute." *Id.*
10. **IDEM—VENUE MUST BE PROVEN.**—To convict one on trial for murder, it is necessary not only to prove the prisoner committed the offense charged, but committed it within the territorial jurisdiction of the court and grand jury, where the indictment is found. The defendant, under all circumstances, is entitled to an instruction embodying this principle of law. *Id.*
1. **CHARGE—WHEN NOT PREJUDICIAL.**—The language, "A ruffian, out of mere wantonness, firing into a crowd upon a sudden motion, is as guilty as if he had lain in wait for his victim," used by the court in stating a hypothetical case to the jury: *Held*, not to be prejudicial to defendant. *State v. Kelly*, 188.
2. **INSTRUCTIONS NEED NOT BE REPEATED.**—When a judge gives an instruction to the jury on any point which is clear and intelligible, we do not think he is bound to repeat it in language of counsel, which is substantially the same but less clear, and therefore liable to be misunderstood. *State v. Waterman*, 454.
3. **AMBIGUOUS INSTRUCTION.**—An instruction to the jury in regard to the effect to be produced by a certain letter alleged to have been written by defendant, construed: *Held*, ambiguous. *Id.*
4. **REMARKS OF A JUDGE, WHEN PROPER.**—The statute which requires the charge or instruction of the court to be in writing, is not violated by the

judge telling the jury that he could not instruct them as to matters of fact. *Id.*

15. INSTRUCTIONS NOT APPLICABLE TO THE CASE MAY BE REFUSED.—When the court refuses to give an instruction containing a correct legal principle, and there is nothing in the transcript to show whether it was or was not applicable to the case in which it was asked, we may presume the refusal was on the ground that it was not applicable to the case on trial. If the court give an instruction which is wrong in regard to a mere abstract principle, which the record affirmatively shows had no application to the case on trial, this will not be held error. *State v. Waterman*, 454; *State v. Squaires*, 739.

See HOMICIDE, 1; MANSLAUGHTER, 1; WATER RIGHT, 2.

INTEREST.

1. LEGAL INTEREST.—Interest exceeding ten per cent. per annum cannot be recovered unless the promise to pay it be in writing. *Williams v. Glasgow*, 447.
2. INTEREST ON NOTE AFTER MATURITY.—The statute gives damages at the rate of ten per cent. per annum for the withholding of money generally. But for withholding of money which bears a higher rate of interest by contract, a corresponding damage for withholding is allowed. And that higher interest is allowed, although the contract itself does not provide for such higher rate after maturity of the debt. *McLane v. Abrams*, 716.

See BILLS AND NOTES, 1; CONTRACTS, 1; EXECUTION, 5.

ISSUE OF FACT.

See DEATH, 1, 3.

JOINT ACTIONS.

See ACTIONS.

JUDGMENT.

1. JUDGMENT, WHEN FINAL.—A judgment is as final when pronounced by the court as when it is entered and recorded by the clerk as required by statute; the judgment is the judicial act of the court; the entry is the ministerial act of the clerk. *California State Telegraph Co. v. Patterson*, 124.
2. *IDEM.*—If the decision of the court finally disposes of the action, and nothing further is to be done by it to complete that disposition, it is a final judgment from which an appeal will lie under our statute, whether it be perfected by entry in the judgment-book or not. *Id.*
3. WHAT CONSTITUTES A JUDGMENT—RIGHT OF APPEAL.—The decision of the court is the judgment; the entry by the clerk is the evidence of it merely. The right of appeal under our practice act does not depend upon the entry or perfection of the judgment of the lower court, but upon the rendition of it. *Id.* 125.
4. FINAL JUDGMENT.—When a judge orders a judgment in a cause, and that order is entered on the journal or minutes of the court, and no further facts are to be ascertained to determine the extent, amount and charac-

- ter of that judgment, but there simply remains the clerical duty of entering in the judgment-book that which the court has determined and ordered to be entered, this is a final judgment from which an appeal lies. *Id.*
5. **JUDGMENT BY DEFAULT AFTER ANSWER FILED.**—After an answer is filed, judgment cannot be entered by default, although the answer may not be served. *Maples v. Geller*, 195.
 6. **JUDGMENT BY DEFAULT CONFINED TO PRAYER OF COMPLAINT.**—Where judgment by default is taken, the plaintiff is confined to a recovery of the particular amount or thing demanded in the prayer of the complaint. *Burling v. Goodman*, 266.
 7. **IDEM—SPECIFIC KIND OF MONEY.**—Where the demand is for judgment in federal currency generally, that is, in dollars and cents, a party cannot recover a judgment upon a default payable in a specific kind of money—gold coin, for instance—especially if the latter kind of money exceed the former in actual value. Before the passage of the specific contract act, the district court had no power to render judgment for any specific kind of money, or order that it be satisfied only by gold or silver coin. *Id.*
 8. **JUDGMENTS—PRESUMPTIONS IN FAVOR OF.**—An appellate court will presume that the judgment of the lower court was sustained by the evidence in the absence of a showing to the contrary. *Carpenter v. Johnson & Waddell*, 281.
 9. **JUDGMENT WHEN UNDER CONTROL OF COURT.**—During the term in which judgment is rendered the court has complete control of it, and upon a proper showing may set it aside. *Ballard v. Purcell*, 290.
 10. **POWER OF APPELLATE COURT TO REVERSE JUDGMENT.**—If an appellate court finds in the investigation of a case that the facts stated in the complaint, with all legal intendments in its favor, will not support the judgment, the court can do no less than reverse such judgment, although counsel may not have hit on the proper grounds for asking a reversal. *Van Doren v. Tjader*, 322.
 1. **JUDGMENT ENTERED IN VACATION VOID.**—A judgment rendered during vacation on demurrer is irregular and void. *Champion v. Sessions*, 404.
 2. **JOINT LIABILITY.**—Persons jointly liable must all be made defendants, and a joint judgment rendered against all. *Keller v. Blasdel*, 413.
 3. **JUDGMENT, WHEN NOT A BAR.**—A judgment not upon the merits is not a complete bar, nor can it be used as evidence in another action to establish the facts constituting the merits of the action in which it was rendered. *Van Vliet v. Olin*, 417.
 4. **IDEM.**—The voluntary dismissal of an action by the plaintiff can settle no rights of property between him and the defendant, nor is it an admission of any right whatever in the defendant. *Id.*
 5. **FINAL JUDGMENT.**—An order of the district court quashing an indictment, discharging the defendant and exonerating his bail, is a final judgment from which an appeal may be taken. *State v. Lojan*, 427.
 6. **IDEM.**—A judgment is final which completely disposes of the action. To make it final it is not necessary that the rights of the parties should be finally determined, or that it be upon the merits. It is final if it disposes of the particular suit in which it is rendered. *Id.*

17. **JUDGMENT ON DEMURREE—WHEN NOT A BAR TO ANOTHER ACTION.**—An order made by a court which purports first to be a judgment on demurree to a complaint, and then shows by a comparison of the recitals of the order and what appears in the pleadings of the case that it was founded on facts which accrued after the filing of complaint, and were only made to appear by the answers, and when there was no trial or admission of the truth of these facts by the plaintiff, cannot be held to be a judgment on the merits so as to bar another action. *Gibson v. Mine*, 440.
18. **IDEM—DISMISSAL OF BILL TO ENFORCE VENDOR'S LIEN.**—A decree dismissing a bill filed to enforce a vendor's lien, even if that decree was final and a bar to any further proceedings to enforce such a lien, would not be a bar to an action of ejectment by the same party. Nor would it deprive the party of the right to avail himself of the benefits of his legal title when made a party defendant in an equitable proceeding. *Id.*
19. **JUDGMENT FOR GOLD COIN ERRONEOUS.**—A verdict and judgment for gold coin expressly is erroneous. *Mitchell v. Bromberger*, 513; *Fox v. Bardou*, 521; *Sigismund v. Troianovich*, 522; *Hastings v. Burning Moscow*, 616; *Clark v. Burning Moscow*, 619; *Gillig v. Burning Moscow*, 620; *Shoks v. Stead & Hunt*, 627; *Müller v. Cherry*, 683; *Hastings v. Johnson*, 708.
20. **JUDGMENT—WHEN COURT OF EQUITY MAY GIVE RELIEF.**—A court of chancery may relieve from a judgment at law, after the law court has lost all jurisdiction. But it must be upon a bill filed in a proper case. This equitable relief cannot be granted on motion. *Killip v. Empire Mill Co.*, 559.
21. **FINAL JUDGMENT—BUT ONE.**—There cannot be two final judgments in the same action. *Low v. Crown Point*, 599.
22. **IDEM—APPEAL FROM INTERLOCUTORY ORDER.**—No appeal lies from an order made before final judgment, except in such cases as expressly authorized by statute. *Id.*
23. **VOID JUDGMENTS.**—An appellate court will set aside or modify void, as well as erroneous, judgments. *Hastings v. Burning Moscow Co.*, 616.
24. **SALE ON EXECUTION UNDER AN ERRONEOUS JUDGMENT.—HOW SET ASIDE.**—Even if the supreme court on appeal from a judgment might order an execution and sale made before appeal to be set aside, yet it is clear that the district court after case reversed has concurrent jurisdiction to do the same thing. It is the proper practice after a judgment has been reversed in this court, to move in the court below, when these facts justify such proceedings, to set aside a sale made on execution under an erroneous judgment. *Hastings v. Burning Moscow Co.*, 621.
25. **IDEM—VOID JUDGMENTS.**—Sales under a void judgment are a nullity. But sales under a judgment merely erroneous are good, and pass the title to the property sold. *Id.*
26. **IDEM.**—Whilst the mere reversal of a judgment will not invalidate a sale regularly made, there is no doubt courts may, under proper circumstances, (when the rights of innocent parties are not thereby injuriously affected) set aside such sales. *Id.*
27. **IDEM—JUDGMENT PAYABLE IN GOLD COIN.**—A judgment for so much money to be paid in gold coin is not void. The judgment is valid, but the clause requiring it to be paid in coin is invalid. All parties are bound to notice the invalidity of the latter clause. *Id.*

28. **IDEM—WHEN SALE SHOULD BE SET ASIDE.**—Sales made under erroneous judgments will be set aside as far as can be done without injury to third parties. When a judgment is reversed the parties should, as near as possible, be restored to the condition they were in before error was committed. A third party purchasing at a judicial sale, and paying his money, ought, as a matter of policy, to be protected. When the judgment is merely modified, and the plaintiff has been the purchaser of property, it may or may not be necessary or proper to set aside a previous sale. *Id.*
29. **MISTAKES IN JUDGMENT—WHEN CORRECTED.**—The mistake in the calculation of the amount for which judgment should have been rendered, should have been corrected by motion in the lower court. *Howard v. Richards*, 648.
30. **JUDGMENT FOR GOLD COIN ERRONEOUS.**—A direction in a foreclosure decree to sell mortgaged property for gold coin only, is injurious to one holding a subsequent lien, and such subsequent lien-holder may appeal from the judgment and have it reversed. *Miller v. Cherry*, 683.
31. **JUDGMENT—MOTION TO SET ASIDE—WHERE MADE.**—There being nothing in the record on which this court could act in setting aside the alleged sale under an erroneous judgment, the appellant must seek his remedy by motion in the court below. *Id.*
32. **JUDGMENT AGAINST INDIVIDUALS—FIRM NAME.**—When a company is sued, under the provisions of our practice act, by its firm name, and subsequently on trial it is proved who compose that company, judgment may go not only against the company property, but against individuals composing that company. *Gillig, Mott & Co. v. Lake Byler Road Co.*, 727.
33. **CLERICAL ERRORS IN JUDGMENT—HOW AMENDED.**—Courts of record may always amend a clerical error in a judgment or order at a subsequent term, when the error is shown by the record, and there is no necessity to resort to other evidence than is afforded by the record to correct the error. *Sparrow & Trench v. Strong*, 869.
34. **IDEM—PENDENCY OF WRIT OF ERROR.**—*Held*, that the pendency of the writ of error is not an impediment to the amending of the record so as to correct clerical errors. (BROSNAN, J., dissenting.) *Id.*
- See APPEAL, 5, 7, 8, 12; CRIMINAL LAW, 1, 2, 3; DIVORCE, 1; EJECTMENT, 8; EVIDENCE, 1, 2, 3; EXECUTION, 1, 2, 3, 4, 5, 7, 8; FORGIBLE ENTRY AND UNLAWFUL DETAINER, 2; JUSTICE OF THE PEACE, 5, 6; RELEASE, 1, 3; REPLEVIN, 1; TAXES, 15.

JUDGMENT BY DEFAULT.

See APPEAL, 4, 17; DAMAGES, 1; JUDGMENT, 5, 6, 7.

JURAT.

JURAT—FORM OF.—A jurat in this form is good: "Subscribed and sworn to before me. A. B., Clerk; by C. D., Deputy Clerk."

JUROR.

See JURY.

JURY.

1. JUROR—WHEN COURT MAY EXCUSE.—When there is any probability that a juror is disqualified, and the court is unable to determine it by reason of its inability to establish the fact constituting such disqualification, it is not required to hazard the regularity of its proceedings by permitting such person to sit as a juror, but may excuse him at any time before he is charged with the case. *State v. Kelly*, 188.
2. JURORS, COMPETENCY OF.—The use of intoxicating liquor by a juror during the progress of a trial, or after the case has been submitted, unless furnished by the party in whose favor the verdict is given, or unless it is shown that intoxicating effects were produced, is no ground for setting aside the verdict or awarding a new trial. *Richardson v. Jones*, 342.
3. IDEM.—Every irregularity on the part of a jury does not authorize the verdict to be set aside unless the party complaining shows, by reasonable presumption, at least, that he has been injured thereby. *Id.*
4. QUALIFIED JUROR—REGISTRY LAW.—By the provisions of the registry law, all persons had, until the last day in the first week in October, A.D. 1865, within which to have their names registered; no disqualification would result until after that time. An elector, otherwise qualified, would, therefore, be a competent juror until after the expiration of the first week in October, although he had not paid his poll-tax. *State v. Salje*, 385.
5. CITIZENSHIP—WHAT CONSTITUTES.—*Held*, error to disallow a challenge to a juror who, on his *voir dire*, stated "that he was born in the Province of Canada, and lived there until he was twenty-one years of age; that he had been told that his father was a citizen of the United States prior to the time of removing to Canada; that he had no knowledge that his father became a citizen of Canada; and also that he did not know of which country his father claimed citizenship; that his residence and home was in Canada so long as he knew anything about it, and that he (the juror) had never been naturalized." *Id.*
6. IDEM.—When all that is known of a person's citizenship is that his residence and home had been in a foreign country, the mere statement of a stranger that he was a citizen of the United States is not sufficient to establish his citizenship in this country against the presumption which would arise from his home being in another country. *Id.*
7. JURORS ENTITLED TO COMPENSATION.—Jurors are entitled to compensation for the time they are in attendance on the court, whether impaneled for the trial of causes or not, except when they are impaneled in the trial of criminal cases, and they reside within five miles of the courthouse. *Thornburgh v. Hermann*, 400.
8. JURORS—CLAIM FOR FEES MUST BE AUDITED.—A juror's claim for fees on the certificate of the clerk should be audited like any other demand against the county. *Id.*
9. SECTIONS 1, 2 AND 3, OF THE ACT CONCERNING JURORS (STAT. 1864-5), CONSTRUED.—*Held*, that the provisions of these sections are directory, and that they must be construed in connection with section 323 of the criminal practice act. The judge and assessor are not required to pass on the qualification of each person in selecting names out of which to form

a jury. A failure to return the panel at the time required could not prejudice the defendant, if he had ample time after the return to inspect the panel. *State v. Squaires*, 739.

10. CHALLENGE TO JUROR MUST SPECIFY GROUNDS.—The party challenging a juror for cause must specify the particular ground, or grounds, of his challenge. *Id.*
11. JURY—WHEN IMPANELED.—A jury is not properly impaneled until they are sworn and charged with the case. *Id.*

See DAMAGES, 1; EQUITY, 3, 7.

JURISDICTION.

1. JURISDICTION—STATUTORY MODE OF ACQUIRING MUST BE COMPLIED WITH.—Where a statute prescribes the mode of acquiring jurisdiction, that mode must be complied with or the proceedings will be a nullity. *Paul v. Armstrong*, 71.
2. JURISDICTION NOT ACQUIRED BY CONSENT.—Consent of parties cannot give jurisdiction. (*Per Brosnan, J.*) *Id.*; *Hastings v. Burning Moscow Co.*, 617.
3. JURISDICTION OF JUSTICE OF THE PEACE MUST BE AFFIRMATIVELY SHOWN.—When any rights are claimed by virtue of a judgment of a court of special and limited jurisdiction, all the facts necessary to confer jurisdiction must be affirmatively shown. *Mallet v. Uncle Sam G. & S. M. Co.*, 156; *McDonald v. Prescott & Clark*, 629.
4. JURISDICTION OF SUPREME COURT ON APPEAL.—When an appeal is taken from a territorial probate court to the district court, and the appeal never determined in the district court, this court has no jurisdiction, nor can such jurisdiction be given by consent. *Lambert v. Moore*, 193.
5. JURISDICTION OF STATE COURTS.—The state courts have jurisdiction to hear and determine causes left pending in the United States territorial courts. *Hastings v. Johnson*, 708.
6. JURISDICTION OF STATE COURTS—VOLUNTARY APPEARANCE.—The fact that defendants appeared and filed their answer in the district court of the state, removes all question or doubt which might otherwise have arisen as to whether the record in this case was lawfully removed from the territorial to the state court. *Low v. Staples*, 723.
7. JURISDICTION IN EQUITY CASES.—The supreme court has jurisdiction in all equity cases, whatever may be the amount in controversy. *Wilde v. Wilde*, 816.

See ANSWER, 1; APPEAL, 12; CERTIORARI, 2; COURTS, 2, 3; ESTATES OF DECEASED PERSONS, 5, 6, 7; FORCIBLE ENTRY AND UNLAWFUL DETAINER, 4, 5; JUSTICES OF THE PEACE, 1, 2, 3, 4, 5, 6; SUMMONS, 1; TAXES, 10.

JUSTICE OF THE PEACE.

1. JURISDICTION OF JUSTICES OF THE PEACE.—The organic act of the territory limiting the jurisdiction of justices of the peace to cases where the debt or sum claimed does not exceed one hundred dollars, is applicable to an action in tort for damages, as well as to an action on contract. *Armstrong v. Paul*, 110.

2. JURISDICTION OF JUSTICES' COURTS.—Courts of justices of the peace being the mere creatures of statute, have no jurisdiction except that which is expressly granted to them by law. *Paul & Co. v. Beegan & Co.*, 278; *McDonald v. Prescott & Clark*, 629.
3. *IDEM.*—The constitutional provision which makes it the duty of the legislature to "fix by law the powers, duties and responsibilities of justices of the peace," and which prohibits the legislature from conferring jurisdiction of cases in which the matter in dispute is a money demand, and the amount of such demand (exclusive of interest) exceeds three hundred dollars, does not extend the jurisdiction of justices of the peace, but only restricts the power of the legislature, and justices' courts could not, by virtue of the Constitution alone, and without an act of the legislature under that Constitution, take jurisdiction of cases where the demand was three hundred dollars. *Id.*
4. *IDEM.*—The Constitution merely confers a power upon the legislature, and does not, in this respect, define the jurisdiction of those courts. *Id.*
5. JUSTICE'S COURT—ENTRY OF JUDGMENT.—The filing of a notice of appeal and undertaking on appeal in a justice's court after the rendition of a verdict by the jury, but before the entry of judgment thereon, does not deprive the justice of authority to enter up judgment on the verdict. *Fugitt v. Cox*, 876.
6. *IDEM.*—A justice should enter up judgment immediately on the rendition of a verdict. But if he omits to do so the day the verdict is rendered, still he may complete his record by afterwards entering the judgment. *Id.*

See COURTS, 2; JURISDICTION, 3; SUMMONS, 1.

LANDS.

See EQUITY, 1; POSSESSION, 1, 2, 3, 4, 5; PRE-EMPTIONS, 1, 2; VENDOR AND VENDEE, 1.

LAWS.

See LEGISLATURE, 1.

LEASE.

See TENANT IN COMMON, 8, 9.

LEGAL TENDER NOTES.

See MONEY, 2.

LEGISLATURE.

1. LEGISLATIVE POWER TO PASS LAWS.—*Held*, That what purports to be a law passed by the legislative assembly in 1862, is not a law, because it was not approved before the adjournment of the legislative assembly. The governor of Nevada Territory was, by law, made a part of the legislative body; as such he could only concur in the passage of a law, whilst the other branches had a legal existence. *School Trustees v. Commissioners of Ormsby Co.*, 288.
2. ACT OF LEGISLATURE—WHEN MUST BE APPROVED.—The act of the legislature approved December 22, 1862, regulating fees and costs, not having

been approved until after the adjournment of the legislature, is null and void.—*Thornbury v. Hermann*, 400.

See CONSTRUCTION, 4, 5.

LIENS.

See VENDOR AND VENDEE, 1.

LIEUTENANT-GOVERNOR.

See CONSTITUTION, 9.

LIMITATIONS.

1. **STATUTE OF LIMITATIONS—RIGHTS OF MORTGAGEE AFTER DEBT IS BARRED.**
When a debt secured by mortgage is barred by the statute of limitations, the mortgage is not thereby extinguished. *Henry v. Confidence G. & S. M. Co.*, 529; *Read v. Edwards*, 772.
2. **IDEM.**—Even when all action or legal proceeding on the mortgage is barred, still if the mortgagee gets rightful possession of the premises mortgaged, he may retain the same until his debt is paid. *Id.*
3. **IDEM.**—The statute of limitations provides a limitation of six months to the maintenance of an action on contracts for the payment of money made out of this state. But the same statute would only bar an action to foreclose a mortgage executed on property within this state to secure such debt after the lapse of four years. *Id.*
4. **STATUTE OF LIMITATIONS.**—Under some circumstances lapse of time is a good defense, although the statute of limitations is not specially pleaded. *Gottschall v. Melsing*, 704.
5. **STATUTE OF LIMITATIONS—ACT OF DECEMBER 19, 1862 (STAT. 1862, 82), CONSTRUED.**—In order to avail himself of this statute a party must show that the final act, by which the execution of the instrument becomes complete, is done out of the state. *Read v. Edwards*, 772.
6. **STATUTE OF LIMITATIONS—NOTE AND MORTGAGE.**—A party holding a mortgage is not barred of his right to foreclose the same until four years shall have elapsed from the accruing of the action, although the statute may have barred an action at law on the debt before that time. *Mackie v. Lansing*, 812.
7. **IDEM.**—A party taking a second mortgage during the period intervening between the time when the statute bars the action at law, and when it bars the proceeding to foreclose, holds his lien subject to the first mortgage. *Id.*
8. **STATUTE OF LIMITATIONS—ESTATES OF DECEASED PERSONS.**—When a party dies owing a debt not barred by the statute of limitations at his death, the holder of the claim has one year after administration granted on the debtor's estate within which to bring his action, although the action would have been barred in less than one year, if the debtor had lived; if, however, the claim is presented to the administrator and rejected, suit must be brought thereon within three months after rejection. *Wick v. O'Neale*, 813.
9. **IDEM.**—The statute giving one year after administration granted applies to all classes of cases. *Id.*

See EJECTMENT, 7.

LOST INSTRUMENT.

See EQUITY.

MACADAMIZED ROAD.

See ROAD, 1, 2.

MALICIOUS ACTIONS.

1. ATTACHMENT—ACTION FOR MALICIOUS SUING OUT OF WRIT, WHAT MUST SHOW.—In an action for malicious suing out the writ of attachment, it is necessary to show not only a want of probable cause but also malice in suing out the writ. It is not sufficient to show malice in prosecuting the writ, if there was none in suing it out. *Levey v. Fargo*, 349.
2. IDEM—ACTS OF AGENTS.—If the writ is sued out by an agent maliciously on his part, and without probable cause, he is liable and not the principal. If the principal maliciously continues the prosecution after he is informed of the fact that the writ was sued out without probable cause, he will be liable to a special action for the damages which accrue after this knowledge is obtained. But the complaint must state these facts correctly. *Id.*
3. IDEM.—Proof that the attachment was sued out, not by the defendant but by his agent, would, *prima facie*, be a good defense, but that might be rebutted by proving that the agent acted under the express direction of his principal. *Id.*

MANSLAUGHTER.

MANSLAUGHTER, WHAT CONSTITUTES.—The court gave the following instruction: "If the jury find from the evidence that James Kelly, on or about the time alleged in the indictment, received a mortal wound of which he died, in Storey county, within a few days thereafter, caused by a shot from a pistol in the hands of the defendant, and that said pistol was discharged accidentally; yet if they find that defendant was exhibiting said pistol in a rude, angry, and threatening manner, and not in necessary self-defense, then they may find the defendant guilty of manslaughter." *Held*, correct. *State v. Kelly*, 188.

See INSTRUCTIONS, 9.

MEASURE OF DAMAGES.

See DAMAGES.

MINING LAWS AND CUSTOMS.

See MINING CLAIMS, 4, 5, 6.

MINING CLAIMS.

1. "MINING GROUND"—TECHNICAL MEANING OF THE WORDS.—The words "mining ground," when used in a deed, have a technical meaning. They refer to that interest which a mere occupant of the mine has in the same. They are not the words used when a fee simple or leasehold interest in real estate is to be conveyed. *Hale & Norcross G. & S. M. Co. v. Storey County*, 83.

2. **MINING CLAIMS—ESTOPPEL.**—When A. first locates a ledge on certain croppings extending eight hundred feet northward and southward, B. afterwards locates a claim near by and is encouraged to go to work by A., who declares it to be his opinion that there are two ledges and that their claims will not interfere. Afterwards it turns out there are in fact two distinct ledges running into the earth at different angles, and widely diverging as they go down, but both mingling their croppings together where A. made his older location, the declarations of A. are evidence he located but one ledge, and may operate as an estoppel against his claiming both. *Van Valkenburg v. Iluff*, 115.
3. **MINING CLAIMS—POSSESSION OF LOCATOR.**—If A. locates a mining claim in the name of B., occupies and works on it, but uses B.'s name, and does all acts in his (B.'s) name, he cannot maintain any action for the claim in his own name. The law would consider his possession the possession of B. He could only acquire an independent right in the claim by abandoning the first location and re-locating in his own name. His rights would date from second location. *Id.*
4. **MINING LAWS—FORFEITURE.**—The mining laws of the locality govern the location and manner of developing the mines, and when they directly point out how such mining claims must be located, and how the possession once acquired is to be maintained, that course must be strictly pursued. A failure to do so might work a forfeiture of the ground. *Mallett v. Uncle Sam G. & S. M. Co.*, 157; *Oreamuno v. Uncle Sam G. & S. M. Co.*, 179.
5. **MINING LAWS AND CUSTOMS—TITLE TO MINING CLAIMS.**—When the courts presume title in the first appropriator, it can only be a title subject to the conditions imposed by the mining laws and customs, under and by virtue of which it was acquired. *Id.*
6. **IDEM.**—Where no mining laws exist, the miner locating a claim would hold only by actual occupancy, and by such work for the development of the mine as would, under all the circumstances, be deemed reasonable, and his right of possession would only be continued by occupancy and use. *Id.*
7. **EVIDENCE OF MINING CUSTOMS.**—Testimony as to mining customs may be introduced under our statute, however recent the date or short the duration of their establishment.
8. **MINING CLAIMS—RIGHTS OF DISCOVERER.**—If it be once established or admitted that one of a company of miners was the real discoverer and entitled to a discoverer's share in the location, then such discoverer could thereafter only be shown to have divested himself of that interest by clear and positive evidence. The evidence of one witness, that the party agreed the discoverer's claim should be divided among all the shareholders in the company, when contradicted by another witness who says he positively refused to assent to such a proposition, is not sufficient. *Smith v. North American M. Co.*, 357.
9. **MINING CLAIMS—LOCATORS OF TENANTS IN COMMON.**—After notices of location were posted and recorded, and the limits of the mine determined, all the locators became tenants in common. The acting locators could not dispose of the interests of their co-tenants. *Chase v. Savage S. M. Co.*, 533.

10. **CONTRACTS—WHEN MUST BE SIGNED BY BOTH PARTIES.**—If a contract is drawn between the several locators of a mine and certain prospectors to give a part of the ground for developing the mine, and signed by part only of the locators, if the prospectors go on to work, it is at their own risk. Those not signing or consenting to the contract are not bound. *Id.*
11. **MINING CLAIMS—RIGHTS OF MINERS.**—The common law doctrine, that he who possesses the surface of the earth owns all to the centre of earth, is greatly modified as to the rights of miners and others on the public lands. One may be entitled to the occupancy of the surface, another to the veins of mineral running under the same land. *Bullion M. Co. v. Croesus M. Co.*, 687.
12. **MINING CLAIMS—POSSESSION OF SOIL—HOISTING WORKS.**—The fact that hoisting works are erected by a trespasser over a vein of ore, does not give the owner of the vein any right to those works, unless he also is owner, or is entitled to the possession of the very soil on which those works are erected. *Id.*
13. **MINING CLAIMS—RIGHTS OF MINERS.**—A miner appropriating a piece of the public domain for mining purposes has a right to the exclusive possession of the ground so taken up. *Gottschall v. Melsing*, 704.
14. **IDEM.**—A miner cannot by mere notice take up a piece of mining ground and hold it for five years without work or occupation; especially, when there is not even an intention to work it, except on the happening of a very uncertain event. *Id.*

See ABANDONMENT, 2; ASSESSMENT, 1; CORPORATIONS, 1, 2; EJECTMENT, 10; TAXES, 1, 16; TENANT IN COMMON, 2, 3.

MISTAKE.

MONEY PAID UNDER MISTAKE OF FACT MAY BE RECOVERED BACK.—If a mistake in fact is made in a settlement, and the party against whom it is made pays more than he is justly bound to pay, he may recover it back. *Travis v. Epstein*, 94.

See CORPORATION, 2; EQUITY, 4; EVIDENCE, 4, 6; JUDGMENT, 29; MORTGAGE, 11.

MONEY.

1. **MONEY.**—To coin money means to fabricate it out of metallic substances. Money is anything which passes current as a general medium of exchange and measure of values. Paper money is different from negotiable securities. *Maynard v. Newman*, 227.
2. **CONGRESS HAS POWER TO ISSUE TREASURY NOTES.**—The power of the national government to issue treasury notes is not derived from the special power to coin money, but is an incident to the more general powers of the government. *Id.*

See JUDGMENT, 7; TAXES, 8, 9.

MORTGAGE.

1. **DUTY OF MORTGAGEE WITH POWER TO SELL.**—A mortgagee or trustee in

- possession, with power to sell, must sell fairly and for the best price he can obtain. *Runkle v. Gaylord*, 100.
2. **PURCHASER FROM MORTGAGEE—WHEN NOT AN INNOCENT VENDEE.**—One who purchases from a mortgagee in possession, with power to sell, and who knows the mortgagee is sacrificing the property, selling it at a small fraction of its value, and that, too, when he could collect his debt out of the rents in from two to five months without sale, is not an innocent vendee, and will not be protected in his purchase. He can occupy no better position than that of an assignee of the mortgage debt. *Id.*
 3. **DEED TO THIRD PARTY—EFFECT OF.**—If he gets a third party, who is ignorant of the fact that the vendee is merely a mortgagee or trustee, to make the purchase, advance the money for him and take the deed to himself (the third party), this will not alter the effect of the deed after the nominal purchaser transfers the title to his principal for whom he made the purchase. *Id.*
 4. **IDEM.**—The deed can only operate as a security for the advance made by the nominal purchaser. When that money and interest is paid by the beneficial purchaser, then he stands just as if he had made the purchase himself without the intervention of a third party. *Id.*
 5. **MORTGAGE—REASONABLE COUNSEL FEES.**—The mortgagor may contract to pay a counsel fee for the expense of enforcing the lien on the property mortgaged in case legal proceedings have to be taken. And such contract will be enforced to the extent of allowing a *reasonable* counsel fee beyond the costs allowed by law. *Cox v. Smith*, 133; *McLane v. Abrams*, 716.
 6. **FORECLOSURE OF MORTGAGE—WHEN A RECEIVER SHOULD BE APPOINTED.**—Inadequacy of property to satisfy lien; insolvency of mortgagor; specific pledge of rents and profits to keep down interest, which were afterwards diverted; permissive waste of property by defendants and threats of one of the defendants to destroy the property, constitute sufficient reasons for appointing a receiver. *Hyman v. Kelley*, 148.
 7. **FORECLOSURE AND SALE—REMEDY OF MORTGAGEE.**—Under the statute of this State the mortgagee has but the one remedy of foreclosure and sale; but the statute does not deprive the mortgagee of any portion of the relief which is usually granted in foreclosure suits where the sale of the property is sought. *Id.*
 8. **MORTGAGE SECURITY INCIDENT TO THE DEBT.**—The quality or character of the contract is in nowise altered because the debt thereby created has been secured by mortgage. The security is merely an incident to the debt contracted and sought to be recovered. *Burling v. Goodman*, 266.
 9. **ASSIGNMENT OF MORTGAGE.**—The assignment of a mortgage usually carries with it all the equitable rights of the mortgagee growing out of it. The assignment of the mortgage is itself but the transfer of an equitable right of action to the assignee. With respect to the reformation of a mortgage, the assignee stands in the same position as the mortgagee. *Ruhling v. Hackett*, 308.
 10. **FORECLOSURE OF MORTGAGE—RIGHTS OF PURCHASER.**—When a party holding a third mortgage purchases at a judicial sale under the first mortgage, and there is no redemption by the second mortgagee, his title becomes absolute and the second mortgage is cut out. *Gibson v. Chedic*, 419.

11. **MORTGAGE—MARKED SATISFIED BY MISTAKE.**—When a mortgagee assigns a note and mortgage as collateral security, and subsequently, either by fraud or mistake, has the mortgage marked satisfied on the record, the same will still be treated as a valid and subsisting mortgage in favor of the assignee as against a subsequent mortgagee with notice. In such case the prior mortgage would only be sustained so far as to protect the assignee thereof. *Gibson v. Milne*, 440.
 12. **MORTGAGE—ASSIGNMENT OF, WHEN VALID SECURITY.**—G. advanced money to a mortgagor to take up a mortgage. The money was paid to the mortgagee, and some days thereafter he assigned the mortgage to the party who advanced the money: *Held*, that if this assignment was made in pursuance of a contract between G. and the mortgagor, it was a valid security for the money advanced. But if the assignment was made after the money had been paid to the mortgagee, and not in pursuance of a previous contract, the mortgage was extinguished, and afforded no security to G. *Nosler v. Haynes*, 576.
 13. **FORECLOSURE OF MORTGAGE.**—A stipulation as to *amount* of judgment does not preclude the court from entering the necessary decree to enforce the payment by sale of mortgaged property. *Id.*, 579.
- See **DEATH**, 2; **ESTATES OF DECEASED PERSONS**, 5, 6, 7; **HOMESTEAD**, 2; **LIMITATION**, 1, 2, 3, 6, 7; **PARTNERSHIP**, 4; **PLEADINGS**, 20, 21; **RECEIVER**, 1; **TAXES**, 9

MOTION.

See **NOTICE**, 1.

MOTIVE.

GOOD CHARACTER—MOTIVE.—In a trial for murder, the good character of the defendant may be proved to explain the motive when the fact of the killing is not denied. *People v. Gleason*, 143.

MUNICIPAL CORPORATIONS.

1. **SECTIONS 1 AND 8 OF ARTICLE VIII CONSTRUED—GENERAL AND SPECIAL LAWS—MUNICIPAL CORPORATIONS.**—The court in construing these sections: *Held*, that section 8 is inoperative until acted upon by the legislature. That section 1 means that the legislature shall pass general laws for the formation of corporations; but that no corporation, except corporations for municipal purposes, shall be created by special act. *City of Virginia v. Chollar Potosi*, 609.
2. **VIRGINIA CITY A MUNICIPAL CORPORATION.**—The city of Virginia was a municipal corporation when the Constitution was adopted, and has never ceased to be a corporation. The law amending the charter is, therefore, constitutional. *Id.*

See **TAXES**, 16, 17, 19.

MURDER.

See **HOMICIDE**.

NEW TRIAL.

- . NEW TRIAL—CUMULATIVE EVIDENCE.—That only is cumulative evidence which is in addition to or corroborative of what has been given at the trial. To render evidence subject to this objection, it must be cumulative, not with respect to the main issues between the parties, but upon some collateral or subordinate fact bearing upon that issue. *Gray v. Harrison*, 424.
- . IDEM.—If the newly discovered evidence brings to light some new fact bearing upon the main question, and it would be likely to change the result, a new trial should be granted. *Id.*
- . NEW TRIAL—WHEN NOTICE OF INTENTION MUST BE FILED. — When the notice of intention to move for new trial is served within two days after judgment, and followed up by statement, etc., as the statute prescribes, the court retains jurisdiction of the case so far as to be able to dispose properly of the motion for new trial, although the court may have adjourned for the term between the day judgment was rendered and the filing of notice without making any order continuing the jurisdiction over the case. But if the term expires, and no notice of intention to move for new trial is filed within the statutory time, then the court loses jurisdiction of the case. *Killip v. Empire Mill Co.*, 559.
- . IDEM—NOTICE OF INTENTION, HOW GIVEN.—A mere verbal notice, given out of court in conversation with counsel of the successful party, that a new trial will be moved for, is not sufficient. *Id.*
- . NEW TRIAL—WHEN NOTICE OF INTENTION CANNOT BE FILED NUNC PRO TUNC.—The court having lost jurisdiction of the case by the lapse of time, and the failure of respondent to file notice of intention to move for new trial within two days after judgment, could not restore its jurisdiction by an order allowing the notice to be filed *nunc pro tunc* as of a former day. *Id.*
- . NEW TRIAL—NOTICE OF INTENTION, WHEN NOT WAIVED.—Extending the time for making statement, under the circumstances of this case, cannot be construed as a waiver of notice of intention to move for new trial. *Id.*
- . APPLICATION FOR NEW TRIAL ON GROUNDS OF SURPRISE.—When a party applies for a new trial on the ground of surprise, he must show that he has evidence, which, if introduced on the second trial, will probably change the result; or at least has evidence tending to rebut the point made by the other side which he complains of as a matter of surprise. *McClusky v. Gerhauser*, 271.

See STATEMENT, 2, 3; VERDICT, 1.

NOTES.

See BILLS AND NOTES.

NOTICE.

- DUE NOTICE—MEANS WRITTEN NOTICE OF FIVE DAYS.—When the statute says an order may be made on due notice to the opposite side, it means the statutory written notice of five days. *Wilde v. Wilde*, 816.

NEV. DEC.—59

OATH.

See JURAT, 1.

OBITER DICTA.

OBITER DICTA.—The opinions of a judge upon a point not directly in issue are merely *obiter dicta*, and have not the force, and are not entitled to the effect of an adjudication. *Burling v. Goodman*, 266.

OBJECTIONS.

See EVIDENCE, 10; DEPOSITION, 9.

OFFICER DE FACTO,

See OFFICE AND OFFICER, 3, 4.

OFFICE AND OFFICERS.

1. **COUNTY OFFICERS**—SECTION 13, SCHEDULE OF CONSTITUTION, CONSTRUED.—County officers as used in the thirteenth section of the schedule to the Constitution, means officers who may be exercising the functions of their office when the Constitution takes effect. It does not include officers *elect* who may not have qualified or entered on the performance of the duties of their office before the Constitution took effect. *Cordell v. Frisell*, 106.
2. **IDEM**—WHEN TERM OF SUCCESSOR COMMENCES.—When the law provides an officer shall be elected every two years, but does not provide when the incumbent shall go out or the newly elected come into office, the newly elected may qualify and enter on the duties of his office as soon as he receives his certificate of election. *Id.*
3. **OFFICER DE FACTO**, WHAT CONSTITUTES.—A person appointed justice of the peace by the selectmen of the county of Carson, who had no power to make such appointment, and commissioned by the governor of the territory of Utah, who was authorized to issue commissions to persons elected to such offices, and having discharged the duties of such office, and been generally recognized as a justice of the peace, is a *de facto* officer, and his acts are valid as to third persons. *Mallett v. Uncle Sam G. and S. M. Co.*, 156.
4. **IDEM**.—An officer *de facto* is distinguished on the one hand from a mere usurper of an office, and on the other hand from an officer *de jure*. *Id.*
5. **COUNTY OFFICERS, WHO ARE**.—The board of education of Storey county prior to the 20th of March, 1865, were "county officers," within the meaning of that phrase as used in the 13th section of Article XVII, Constitution of Nevada. *State v. Tuford*, 201.
6. **IDEM**—WHEN OFFICES MAY BE ABOLISHED.—There are certain county officers designated in the Constitution. These offices cannot be abolished without a constitutional change, nor the incumbents removed prior to January, 1867. Other county offices can be created or abolished at the will of the legislature. *Id.*
7. **IDEM**.—The legislature is required to make a uniform system of county government, and to provide for a uniform system of public schools. In

carrying out these provisions, they may abolish any county offices other than those specially created by the Constitution. *Id.* 202.

- . **IDEM—EFFECT OF ABOLISHING AN OFFICE.**—Tilford held the office of superintendent of public instruction *ex officio* as president of the board of education. The board of which he was president is abolished. His presidency ceases with the existence of the board. His office of superintendent being a mere *ex officio* attachment to the other office, expires with his presidency. *Id.*
- . **IDEM—APPOINTMENT OF, WHEN ILLEGAL.**—Taylor and others claiming to be trustees of school districts, having been appointed by a board having no legal existence, are not officers known to the law. *Id.*
- ee CONSTITUTION, 4, 9; COUNTY COMMISSIONERS, 1, 2; COUNTY RECORDER, 1, 2; DEPOSITION, 7; ELECTIONS, 1, 2; EXECUTION, 6; PLEADINGS, 22; SHERIFF, 1, 2; WRIT OF RESTITUTION, 1.

PARDON.

- . **PARDONING POWER, HOW EXERCISED.**—The governor of the territory of Nevada had the right to pardon absolutely or conditionally, but no right to commute one punishment for another. He could not issue an order to confine a man in the penitentiary who had been sentenced to be hung. *Ex parte Janes*, 270.
- . **IDEM.**—The governor of the State of Nevada could not pardon without the concurrence of at least two other members of the board in whom the pardoning power is vested by the Constitution. *Id.*
- . **PARDON UPON CONDITIONS.**—If a condition precedent be imposed, that condition must be performed, or the pardon never takes effect. If subsequent, the pardon becomes null and void on the breach of the condition. *Id.*

PAROL EVIDENCE.

See **BILLS AND NOTES**, 3; **EVIDENCE**, 4, 5.

PARTNERSHIP.

- . **PARTNERSHIP—DECLARATION OF PARTNER, WHEN NOT BINDING.**—One partner can only bind another in regard to the partnership transactions, and not by declarations about other and distinct affairs. Nor can an agent bind his principal, except in matters pertaining to his agency. *Jones & Colla v. O'Farrel, James & Co.*, 302.
- . **IDEM—WHO NOT PARTNERS.**—A party renting property and furnishing material at a stipulated price to a manufacturing company, wherewith to conduct their business, does not thereby become a member of the firm, nor responsible for their debts. Nor is such party responsible for the debts of the company contracted in improving the property rented according to the terms of their lease. *Id.*
- . **IDEM—WHEN NOTICE NEED NOT BE GIVEN.**—A. and B. being partners in one particular business, A. is not bound to notify the world, nor any particular person, that he is not a partner with B. in a new firm into which B. has entered with other parties, and which new firm is doing

- business in a different name from that under which A. and B. always conducted their business. *Id.*
4. PARTNERS—NOT BOUND BY MORTGAGE OF COPARTNER.—One partner cannot bind the interest of his copartner in real estate by mortgage. *Arnold v. Stevenson*, 746.
 5. PARTNERSHIP—HEARSAY EVIDENCE.—Hearsay evidence cannot be received to show that one is a partner in a particular firm. *Mears v. James*, 851.
 6. IDEM—WHEN NOT ESTABLISHED.—Parties renting property to amalgamators crushing their ore and running it into their amalgamating pans, at a fixed price per ton, do not thereby become partners with the amalgamators. *Id.*
 7. IDEM—NOTICE TO THE WORLD.—A. and B. being partners in any particular business, A. is not bound to notify the world, nor any particular person, that he is not a partner of B.'s in a new and distinct business into which B. enters with other partners and under a different firm name. *Id.*

See JUDGMENT, 32; RECEIVER, 3.

PERSONAL PROPERTY.

See SALE.

PLEADINGS.

1. PLEADINGS—WHEN REPLICATION MAY BE DISREGARDED.—Where a complaint in ejectment charges the defendants with being in possession of certain premises, and the answer admits the allegation, a replication repugnant to that allegation, and denying that the defendants are in possession, does not entitle defendants to judgment on the pleadings. The replication may be disregarded. *Sankley v. Noyes*, 58.
2. PLEADINGS—CONCLUSION OF LAW.—The allegation that defendant became indebted to plaintiff is simply a statement of a conclusion of law; the facts out of which the indebtedness arose should be stated. *California State Telegraph Co. v. Patterson*, 125.
3. IDEM—WHEN AMENDMENTS SHOULD BE ALLOWED.—If, instead of demurring, advantage be taken of a defective pleading by motion for judgment, the court should permit an amendment of the pleading where an amendment will cover the defect, the same as if a demurrer had been interposed. *Id.*
4. PLEADINGS, HOW CONSTRUED.—The pleadings in this case, properly construed, admit a common possession but deny a common title or right of possession. *Crosier v. McLaughlin*, 296.
5. PLEADINGS—GENERAL DEMURRER.—Misjoinder of actions cannot be taken advantage of on a general demurrer. *Rolling v. Hackitt*, 308.
6. WRITTEN AGREEMENT, WHEN PRESUMED TO BE LAWFUL.—Where the terms and conditions of an agreement are set out in a complaint, and a violation of that agreement is charged against the defendant; if it is such an instrument as the law requires to be in writing and the complaint is silent as to whether it was oral or written, courts will presume it to be lawful or written agreement until the contrary is shown. *Vas Duren v. Tjader*, 321.

7. WHAT A DEMURRER ADMITS.—The party demurring admits the truth of whatever is contained in the complaint and nothing more. A demurrer does not admit new facts. *Id.*
8. CONTRACTS, PENALTY FOR BREACH OF.—The violation of a contract in which a penalty for breach is inserted, does not necessarily authorize the recovery of such penalty. *Richardson v. Jones*, 342.
9. *IDEM*—WHEN ACTUAL DAMAGES MUST BE SHOWN.—In an action upon such an instrument, the plaintiff should not only prove the contract and the breach by defendant, but in addition thereto it is necessary to establish actual damages resulting from such breach, or he can only recover a mere nominal sum. In such case an allegation of actual damage, or the statement of facts from which it must be inferred, is indispensably necessary to the sufficiency of a complaint where more than mere nominal damages were claimed. *Id.*
10. ATTACHMENT WITHOUT PROBABLE CAUSE.—In an action for damages for improperly suing out a writ of attachment, it is necessary to aver the attachment was sued out "without probable cause." If such averment is omitted in the complaint, but words of similar import are employed in lieu thereof, a verdict will cure the defective complaint, even if it was such a one as should not have been sustained on demurrer. *Levey v. Fargo*, 349.
11. DEMURRER—OBJECTIONS TO, AFTER ANSWER FILED.—Where a demurrer is interposed to such a complaint upon the general ground that it does not state facts sufficient to constitute a cause of action, goes on to point out the particulars in which the complaint is defective, but does not show the real defect, this court will not hold it was error to overrule the demurrer if the defendant chooses to answer instead of standing on his demurrer. This court will treat the case as if the party had answered without any demurrer. *Id.*
12. PLEADINGS—CONCLUSIONS OF LAW.—If the material facts stated in the complaint are denied in the answer, or if other facts are stated in avoidance, it is not necessary to deny mere conclusions of law. *Hooper v. Meyer*, 367.
13. PLEADINGS, WHAT COMPLAINT SHOULD STATE.—A complaint for money expended and services performed, should state the money was expended for the use and benefit of defendant, and at his instance and request. *Huguet v. Owen*, 395.
14. PLEADINGS.—SUFFICIENCY OF COMPLAINT FOR MONEY LOANED.—In an action to recover money loaned, if the complaint charges the indebtedness, the manner in which it accrued, the promise to pay and the refusal, it is sufficient. *Williams v. Glasgow*, 447.
15. PLEADINGS—VOID INSTRUMENTS.—When the statute makes an instrument void or invalid it is proper to plead the statute specially. *Maynard v. Johnson*, 541.
16. *IDEM*.—When the statute declares certain instruments shall be void, a defendant may plead the facts which make it void, although in so doing he shows a violation of law by himself. It being the policy of the law to allow such pleas to prevent the violation of the statute. *Id.*
17. *IDEM*—WANT OF STAMPS.—The defendant might plead the want of the proper stamps, if such deficiency of stamps rendered the notes invalid. *Id.*

18. PLEADINGS—POSSESSION OF A PROMISSORY NOTE NEED NOT BE ALLEGED.—The plaintiff in an action against the maker of a promissory note, may show that the note sued on is in the possession of defendant, although that fact is not alleged in the complaint. If the plaintiff is the owner of a promissory note, he has a right of action notwithstanding the defendant may be in possession thereof. The plaintiff's want of possession changes the character of the proof to be introduced, but not the character of the pleadings. *McCluskey v. Gerhauser*, 571.
19. PLEADINGS—LOSS OF AN INSTRUMENT.—A party need not plead the loss of an instrument to be allowed to introduce secondary evidence of its contents. It is only necessary to prove such loss on trial. The rule of pleading is different where a negotiable note properly indorsed is lost. *Id.*
20. PLEADINGS—ADMISSION IN, MUST PREVAIL OVER FINDINGS.—The answer admits the assignment of the mortgage to Gentry as security for the money advanced. This admission must prevail over the findings of the court to the contrary. *Nosler v. Haynes*, 579.
21. PLEADINGS—NO LEGAL DEFENSE IN ANSWER.—The complaint avers the mortgage was not paid, and that it was regularly assigned. The answer denies neither of these allegations, and sets up no legal defense. On such pleadings, the plaintiff is entitled to his decree, although it seems from the facts found, the defendant had a perfect defense against the mortgage claim, which, however, he utterly failed to set up. (*By Beatty, J.*) *Id.*
22. PLEADINGS—ANSWER OF AN OFFICER.—An answer in which an officer attempts to justify a seizure under execution, should not only set out the execution, but also the judgment on which the execution is founded, and show distinctly that defendant is an officer properly acting under such execution. *McDonald v. Prescott*, 629.
23. PLEADINGS—NONPAYMENT OF PROMISSORY NOTE.—A complaint setting out a note in full, and alleging the execution and delivery to, and ownership thereof by plaintiff, and that there is "due, owing, and payable" a certain sum, is a good complaint, although it does not in direct terms allege the nonpayment of the note. *Howard v. Richards*, 648.
24. PLEADINGS—AMENDMENT OF COMPLAINT.—A complaint cannot be altered in a material part thereof without notice to defendant. Especially it cannot be so altered as to set out a new and distinct cause of action. *Keller v. Blasdel*, 680.
25. PLEADINGS AND PROOF MUST CORRESPOND.—A party must prove the case he makes in his pleadings, or fail; if he alleges a contract, and seeks to recover under that contract, he cannot recover on proof of a trespass. *Carson River L. Co. v. Bassett*, 760.
26. AMENDMENT OF COMPLAINT—LEAVE TO ANSWER.—It is error to render judgment against a party who is made defendant by amending a complaint without giving him an opportunity to answer. *Mears v. James*, 851.
27. PLEADINGS—SUFFICIENCY OF ANSWER.—*Held*, that there must be a direct, and not argumentative, denial in the answer of the allegations in the complaint. *Gallagher v. Dunlap*, 836.
28. IDEM—ANSWER DEFECTIVE IN FORM.—When an answer is put in, defe-

tive only in form, plaintiff should demur, and not move for judgment on the pleadings. He cannot, by moving for judgment on the pleadings, deprive defendant of the right to amend. *Id.*

See ATTACHMENT, 8; DEATH, 1, 2, 3; EJECTMENT, 5, 6, 7, 9, 10; MALICIOUS ACTIONS, 1, 2, 3; PRACTICE, 1.

POLL TAX.

See JURY, 4; TAXES, 5, 12.

POSSESSION.

1. POSSESSION OF PUBLIC LAND.—What acts are sufficient to constitute such a possession of public land as will maintain ejectment, must, in a great measure, depend upon the character of the land, the locality, and the object for which it is taken up. *Sankley v. Noyes*, 58.
2. KIND OF POSSESSION NECESSARY TO MAINTAIN EJECTMENT.—Possession is *prima facie* evidence of title and sufficient to maintain ejectment, but when possession alone is relied on, it must be an actual *bona fide* occupation. The mere staking off of land without occupation or other acts of ownership would not constitute such a possession as would maintain ejectment. *Id.*
3. POSSESSION OF LAND.—Facts necessary to constitute possession of land discussed. *Brown v. Roberts*, 339.
4. ACTUAL POSSESSION OF TIMBER LAND—WHAT CONSTITUTES.—An occupation of timber land within boundaries clearly marked and defined constitute possession, without any actual inclosure of such lands by fence. The law only requires such possession to be taken as will make the land available and useful to the occupier. *McFarland v. Culbertson*, 788.
5. *IDEM*—PRIMA FACIE CASE.—Prior possession of land by the plaintiff, and ouster by defendant, makes a *prima facie* case for plaintiff, and throws the burden of proof on defendant to show that he has some superior right. *Id.*

See EJECTMENT, 2, 4; EQUITY, 1, 2, 14; MINING CLAIMS, 3, 12; PLEADINGS, 4; SALE, 1, 2, 3, 5, 6; SURVEY, 2, 3; TENANT IN COMMON, 1.

POSSESSORY CLAIM.

See ASSESSMENT, 1, 2; TAXES, 1, 2.

POWER OF ATTORNEY.

REVOCATION OF POWER OF ATTORNEY—EFFECT OF DEPOSIT FOR RECORD.—The deposit for record of a revocation of a power of attorney in the proper office operates under our statute as a notice to all parties dealing with the attorney. By such deposit, the revocation become absolute without actual notice to the attorney. *Arnold v. Stevenson*, 746.

PRACTICE.

PRACTICE ON OVERRULING DEMURRER.—The proper practice when a demurrer is overruled is to give time to plead. *Easterbrook v. Upton*, 337.

See JUDGMENT, 32; PLEADINGS, 1.

PRACTICE ACT.

1. SECTION 68 OF PRACTICE ACT CONSTRUED.—The object of this section is to relieve a party from the effects of some judgment or order made by the court in its regular proceedings; not to give a party some affirmative right which he has lost by his own conduct, but in regard to which the court has made no order whatever. *Killip v. Empire Mill Co.*, 559.
2. SECTIONS 25+5, PRACTICE ACT, CONSTRUED.—The statute (Practice Act, Secs. 25+5) does not restrict any pre-existing right or remedy, but seems to give in some cases a new and more extensive remedy. *Low v. Staples*, 723.

PROVISIONS CITED:

Stat. 1861.	Page 315.	Sec. 6.	Action, 283.
1861.	" 319.	" 32.	Judgment, 738.
1861.	" 320.	" 37.	Pleadings, 650.
1861.	" 325.	" 70.	Pleadings, 650.
1861.	" 333.	" 120.	Attachment, 664, 676, 672.
1861.	" 337.	" 143.	Receivers, 824.
1861.	" 338.	" 144.	Judgment, 130, 603.
1861.	" 338.	" 147.	Judgment, 268.
1861.	" 338.	" 150.	Judgment by Default, 291.
1861.	" 346.	" 195.	Statement, 215, 368, 563.
1861.	" 347.	" 200.	Replevin, 582.
1861.	" 347.	" 203.	Judgment-roll, 602.
1861.	" 348.	" 210.	Execution, 582.
1861.	" 357.	" 246.	Mortgage, 153.
1861.	" 359.	" 254-5.	Claims to Real Property, 724-6.
1861.	" 359.	" 260.	Mortgage, 153.
1861.	" 362.	" 275.	Appeals, 294, 409.
1861.	" 362.	" 280.	Judgment-roll, 652.
1861.	" 362.	" 281.	Appeals, 425.
1861.	" 363.	" 283.	Appeals, 622.
1861.	" 363.	" 284.	Appeals, 656.
1861.	" 363.	" 285.	Appeals, 127, 291.
1861.	" 363.	" 286.	Appeals, 131, 295, 409.
1861.	" 372.	" 335-7.	Arbitration, 28.
1861.	" 373.	" 340.	Interest of Witness, 24.
1861.	" 382.	" 394.	Lost Instrument, 573.
1861.	" 384.	" 403.	Certiorari, 823.
1861.	" 384.	" 403.	Appeal, 73.
1861.	" 384.	" 409.	Certiorari, 824.
1861.	" 385.	" 410.	Judgment, 82.
1861.	" 414.	" 581.	Judgment, 738.
1861.	" 418.	" 608.	Probate Court, 82.
1861.	" 419.	" 610.	Justice's Court, 79, 280.
1861.	" 424.	" 647-8.	Forcible Entry and Unlawful Detainee 371, 376-7.
1861.	" 424.	" 651.	Forcible Entry and Unlawful Detainee 75, 371, 376-7.

PRE-EMPTIONS.

1. **PRE-EMPTION RIGHTS, HOW ESTABLISHED.**—It is not sufficient for defendants to show the land is subject to pre-emption. They must show all the facts which establish their rights as pre-emptors. The plaintiff having shown his right as an occupant, the defendants, to have protected their possession, should have shown the land subject to pre-emption, and themselves of that class of persons entitled to pre-emption rights. *McFarland v. Culbertson*, 788.
2. **IDEM—CERTIFICATE OF REGISTER.**—A certificate of the register of the land office that defendants had filed a declaratory statement in his office, did not prove that they were of the class of persons entitled to pre-empt. If the declaratory statement might be received as evidence on that point, at least that statement, or a certified copy thereof, should have been introduced. *Id.*

PRESUMPTIONS.

1. **ACCIDENTAL DISCHARGE OF PISTOL—PRESUMPTIONS.**—When a party draws a pistol with the avowed intention of killing another, third parties interfere to prevent the threat being carried out; the pistol goes off, and the party threatened is killed; the natural presumption would be that the defendant had succeeded in carrying out his intention, notwithstanding the interference. *State v. Bonds*, 775.
2. **PRESUMPTIONS.**—All presumptions are in favor of the regularity of the proceedings in the court below. *Champion v. Sessions*, 781.

See JUDGMENT, 8.

PRINCIPAL AND AGENT.

1. **PRINCIPAL AND AGENT.**—Every written contract made by an agent, in order to be binding upon his principal, must purport, on its face, to be made by the principal, or the intent to bind him must appear in the instrument itself. *Chase v. Savage S. M. Co.*, 583.
2. **PRINCIPAL AND AGENT—ACCEPTANCE OF NOTE OR BILL.**—The question of agency, as to what acts are necessary to bind the principal, discussed: *Held*, that a bill headed "Lake Bigler Road Company," signed by "Butler Ives, Superintendent," and accepted by "J. E. Garrett, Secretary L. B. R. Co.," was sufficient on its face to charge the company on the acceptance. *Gillig, Mott & Co. v. Lake Bigler Road Co.*, 727.
3. **IDEM—PREVIOUS ACCEPTANCES.**—Although the written authority to the secretary did not authorize him to accept bills, yet the fact that he had frequently accepted bills in favor of plaintiff, which were paid by defendants without complaint, was sufficient to bind defendants. *Id.*

PROBATE COURT.

See COURTS, 1; FORCIBLE ENTRY AND UNLAWFUL DETAINER, 3.

PROHIBITION.

See WRIT OF PROHIBITION.

PROMISE.

See GUARANTY, 4.

PROMISSORY NOTES.

See BILLS AND NOTES

PURCHASER.

See VENDOR AND VENDEE, 1.

QUIETING TITLE.

TO QUIET TITLE.—Decrees in equity to quiet title should be against all parties to the suit standing in the same relation to the property. *Low v. Blackburn*, 593.

REASONABLE DOUBT.

See EVIDENCE, 12, 13, 14.

REASONABLE TIME.

REASONABLE TIME.—Where no time is specified when an act is to be done, it will be presumed in law that it is to be done within a reasonable time. *Richardson v Jones*, 342.

RECEIVERS.

1. RECEIVERS, WHEN WILL BE APPOINTED.—Receivers will be appointed in foreclosure suits where it is necessary to prevent fraud, injustice or loss of security.—*Hyman v. Kelly*, 149.
2. RECEIVER—WHEN MAY BE APPOINTED.—The district court has the power to appoint a receiver on an *ex parte* application, when a proper showing is made.—*Maynard v. Railey*, 823.
3. *IDEM*.—The court will appoint a receiver when one partner excludes his copartner from a participation in the affairs of the partnership. So, too, when both partners have assigned their respective interests, and the assignees cannot agree. *Id*.
4. *IDEM*.—When suit is brought and summons issued, the court has power to appoint a receiver before the summons is served on defendants; but the appointment of a receiver ought not to be made without notice, except in cases of emergency. *Id*.

See MORTGAGE, 6.

RECORDER.

See COUNTY RECORDER.

REFEREE.

See APPEAL, 1.

REGISTER LAND OFFICE.

See PRE-EMPTIONS, 2.

REGISTRY LAW.

See JURY, 4.

RELEASE.

1. RELEASE OF JUDGMENT.—If a plaintiff, in consideration of one hundred dollars paid to him, and a promise made by defendant to do certain other things which would be advantageous to him when performed, agrees to release a judgment for two hundred dollars, this is not a release or satisfaction of judgment until the promise is performed. But if on such consideration the plaintiff executes a technical release *in presenti*, the failure to perform the promise will not reinstate the judgment. *Davis v. Bowker*, 410.
2. IDEM—MUST BE UNDER SEAL.—A release must be under seal. *Id.*
3. IDEM—WHEN CONTRACT IS NOT EXECUTED.—If a hundred dollars be paid in part consideration of a release, to be thereafter executed, of a judgment for a larger amount, and the contract for the release fall through, the one hundred dollars may, under certain circumstances, be applied as a credit on the judgment, which, upon the performance of other acts, was to have been released. *Id.*

REMARKS OF COURT.

See INSTRUCTION, 5, 14.

RENT.

RENT—WHEN AGREEMENT TO REDUCE, VOID.—When rent is fixed at a certain rate for a definite period, an agreement without consideration to reduce the rent during that period is void. *Hooper v. Meyer*, 366.

See FORCIBLE ENTRY AND UNLAWFUL DETAINER, 8; TENANT IN COMMON, 7, 8.

REPEAL.

See FORCIBLE ENTRY AND UNLAWFUL DETAINER, 7.

REPLEVIN.

REPLEVIN—FORM OF JUDGMENT.—In an action of replevin, the judgment must be for the return of the property, and an alternative judgment for its value if not returned. An absolute judgment for its value, not allowing defendant to satisfy the judgment by return of the property with costs and damages, is erroneous. *Lambert v. McFarland*, 581.

See TENANT IN COMMON, 5.

REVENUE STAMPS.

See STAMPS.

ROAD.

1. MACADAMIZED ROAD—DEFINITION OF, GIVEN IN OPINION. *State ex rel. Haydon v. Curry*, 208.
2. MACADAMIZED ROAD—CHARTER, WHEN FORFEITED.—A charter authorizing one to collect tolls upon the making of a macadamized road between two points, will not authorize the collection of tolls until such improvement has been completed from one end to the other of the road. A fall-

ure to comply with the requirements of the law in regard to finishing the road, works a forfeiture of the charter. *Id.*

SALARY.

See CONSTITUTION, 9.

SALE.

1. **SALE OF PERSONAL PROPERTY—DELIVERY OF POSSESSION.**—Delivery of possession of personal property may be either actual or constructive. An actual delivery is contemplated by the statute, unless such delivery be impossible or extremely inconvenient, in which case a symbolical delivery is sufficient. *Doak v. Brubaker*, 183.
2. **IDEM.**—Where the property is in the possession of a bailee also, actual delivery is not necessary; the only delivery which could be made would be to give an order for it, or deliver the receipt, or obtain the recognition of the bailee; but when in the possession of an agent or servant a different rule prevails. *Id.*
3. **IDEM—STATUTE OF FRAUDS.**—To take the case out of the operation of the statute of frauds there must not only be a transfer of the right of property, but the possession must accompany it. *Id.*
4. **SALE, DELIVERY AND CHANGE OF POSSESSION OF PERSONAL PROPERTY—STATUTE OF FRAUDS.**—In construing the statutes of this state: *Held*, that to constitute a valid sale of personal property, against creditors, there must be an immediate delivery, accompanied with an actual and continuous change of possession; that the change must be actual, *bona fide*, and must continue for such a length of time as will, under the circumstances of each case, be likely to operate as a general advertisement of the sale or change of title of the property. *Carpenter v. Clark*, 754.
5. **SALE AND DELIVERY OF PERSONAL PROPERTY.**—When real estate is sold, and at the same time possession of the realty is delivered by the vendor to the vendee, a bill of sale from the same vendor to the same vendee is given for the personal property in and on the real estate sold, the possession of the personal property passes with the possession of the realty; but when the same bill of sale is also of other property not on the real estate sold, there must be other and actual delivery to pass the possession as against creditors. *Sharon v. Shaw*, 799.
6. **IDEM—CHANGE OF POSSESSION.**—The mere request made to a servant of the vendor who has the property in actual possession to keep it for the vendee, without any removal or change in the situation of the property, is not an actual delivery or change of possession of the property. *Id.*
7. **DEPOSITIONS—INFORMALITIES IN CERTIFICATE OF OFFICER.**—Depositions will not be rejected for informality in the certificate of the officer before whom they are taken, when it appears that both parties were present, and the witnesses were cross-examined. *Lockhart v. Mackie*, 804.
8. **IDEM—STIPULATION.**—A stipulation of the parties to a suit may dispense with any certificate by the officer taking depositions. *Id.*
9. **OBJECTIONS MUST BE MADE IN LOWER COURT.**—It is too late to raise the objection in this court for the first time that there was no proof of the absence of the witnesses whose depositions were read. *Id.*

See EVIDENCE, 16; EXECUTION, 2, 3, 4, 8; JUDGMENT, 24 to 28.

SCHOOLS.

See OFFICE AND OFFICERS, 7, 8, 9; TAXES, 6.

SEAL.

A SEAL IMPORTS CONSIDERATION.—*Pyman v. Kelly*, 149.

See RELEASE, 2.

SHERIFF.

1. SHERIFF—WRONGFUL WITHHOLDING OF MONEY.—Section 10 of an act entitled "An act relative to sheriffs" (Stat. 1861, 103), only refers to those cases where there is a wrongful withholding of the money collected by the sheriff, and not where there is a mistake in its application, and it is shown that the sheriff has not the money in his hands. *Giffin v. Smith*, 881.
2. IDEM—POLICY OF THE LAW.—It is not the policy of the law to inflict penalties upon its officers for mistakes or errors of judgment. *Id.*

See WRIT OF RESTITUTION, 1.

STAMPS.

1. WHEN INSTRUMENTS MAY BE STAMPED.—All instruments made prior to the 30th of June, A. D. 1864, if not stamped at the time of the execution, may be so stamped at any time afterwards. *Carpenter v. Johnson & Waddell*, 281.
2. STAMP ACT OF CONGRESS CONSTRUED.—The stamp act of Congress does not declare any notes to be invalid for want of the proper stamps, except where omitted for the purpose of evading the law. [Overruled in opinion upon rehearing, *post* 25.] *Maynard v. Johnson*, 541.

See APPEAL, 18; CONSTRUCTION, 7; PLEADINGS, 17.

STATEMENT.

1. STATEMENT ON APPEAL.—Papers and evidence copied into a transcript, without any certificate from the judge or clerk that the same were used or referred to on motion for a new trial, do not constitute a statement on appeal. *Van Valkenburg v. Huff*, 115.
2. STATEMENT ON APPEAL FROM ORDER GRANTING A NEW TRIAL.—In appeals from orders granting or refusing a new trial, a statement on appeal is not necessary. This court, without such statement, will consider "the statement on motion for new trial, the pleadings, depositions, documentary evidence on file, and minutes of the court." *Gregory v. Frothingham*, 211.
3. STATEMENTS ON MOTION FOR NEW TRIAL.—The statute requiring statements on motion for new trial to contain the grounds of such motion is merely directory. A statement not made strictly in compliance with the spirit of the law as to the grounds of motion, will still entitle the moving party to a hearing. *Hooper v. Meyer*, 365.
4. STATEMENTS ON MOTION FOR NEW TRIAL.—The method of making and setting statements on motion for new trial commented on. *Levey v. Fargo*, 350.

5. **STATEMENT—ASSIGNMENT OF ERRORS.**—This court has never held it indispensable that a statement should be made in the court below of the grounds relied on upon appeal, in order to entitle the appellant to a hearing. The exceptions to the rulings of the court below will be treated as a substitute for a statement of the grounds of error relied on. *Gillig, Mott & Co. v. Lake Bigler Road Co.*, 727.
6. **STATEMENT NOT CONTAINING ALL THE EVIDENCE.**—This court cannot reverse a judgment for want of sufficient evidence to sustain the verdict, unless the record shows that all the material evidence is before us. *State v. Bonds*, 775.

See **NEW TRIAL**, 3, 6.

STATUTES.

1. **STATUTES—WHEN MANDATORY.**—Whenever a statute prescribes certain specific acts to be done as prerequisite to the acquiring of jurisdiction, or the enforcement of a legal remedy, such acts must be substantially performed in the manner prescribed, in order to give validity to the proceeding. *Steel v. Steel*, 27.
2. **STATUTES, HOW CONSTRUED.**—The rule is cardinal and universal that if a law is plain and unambiguous, there is no room for construction, or interpretation. *Brown v. Davis*, 346.
3. **IDEM.**—In the construction of a statute the intention of the legislature is the primary object to be ascertained, but to ascertain it recourse should first be had to the language employed, and if that be plain and unambiguous the courts must give it its strict and grammatical construction. *Id.*
4. **AMENDING STATUTES—EFFECT OF.**—If the legislature passes an act amending a former act, but providing the amendatory act shall not take effect until a future day, the old act remains in full force until the amendment goes into operation. *Bowers v. Beck*, 675.
5. **IDEM.**—So, too, if it is provided in the amendatory act that such amendments shall only be operative for the enforcement of future contracts, the old law is in full force, so far as relates to the enforcement of prior contracts. *Id.*
- See **ARBITRATION**, 1; **COMMON LAW**, 1, 2; **CONSTRUCTION**, 1, 4, 5, 6, 7; **INDICTMENT**, 1; **JURISDICTION**, 1; **JURY**, 9; **LEGISLATURE**, 1, 2; **LIMITATIONS**, 5; **NOTICE**, 1; **STATEMENT**, 3; **SURVEY**, 1.

STATUTES CITED.

1861.	Page	14.	Secs. 24-25.	Conveyances, 749.
"	"	15.	" 27-28.	Recording Powers of Attorney, 749, 752.
"	"	20.	" 64.	Fraudulent Conveyances, 184, 756.
"	"	24.		Homestead, 518.
"	"	29.	" 16.	Limitations, 530.
"	"	30.	" 23.	Estates of Dead Persons, 814.
"	"	79.	" 112.	Embracery, 779.
"	"	88.	"	Crimes, 780.
"	"	99.	" 1 to 5.	Interest, 136.
"	"	100.	" 4-5.	Interest, 449, 526, 719.

1861.	Page 103.	Secs.	10.	Sheriff, 881.
"	" 128.	"	23.	County Commissioners, 317.
"	" 147.	" 6, 7, 8.		County Assessor, 107.
"	" 208.	" 138.		Estates of Deceased Persons, 842.
"	" 209.	" 142.		Estates of Deceased Persons, 842.
"	" 210.	" 150.		Estates of Deceased Persons, 841.
"	" 267.	" 4.		Surveys, 321.
"	" 273.	" 2-7.		Common Schools, 284.
"	" 287.	"		County Warrants, 393.
"	" 308.	" 44-5-6.		Officers, 65.
1862.	" 64.	"		Elections, 65.
"	" 82.	" 34.		Limitations, 530, 814.
"	" 99.	" 10.		Habeas Corpus, 382.
"	" 101.	" 26.		Habeas Corpus, 273.
"	" 120.	" 1.		Actions, 737.
"	" 133.	" 6.		County Assessor, 107.
1864.	" 38.	" 3.		Real Estate, 86.
"	" 39.	" 4.		County Assessor, 107.
"	" 45.	" 1.		Counties, 318.
"	" 74.	" 4.		Issue of Fact, 399.
1864-5.	" 81.	" 30.		Appeals, 602.
"	" 84.	"		Specific Contract Act, 482.
"	" 111.	" 8.		Courts of Justice, 622.
"	" 137.	" 2, 3.		Jurors, 740.
"	" 163.	"		Delinquent Taxes, 440, 833.
"	" 209.	"		Virginia City, 610.
"	" 224.	"		Attachment, 450.
"	" 225.	"		Homestead, 478.
"	" 259.	" 9.		Jurors' Fees, 404.
"	" 262.	"		County Commissioners, 861.
"	" 386.	" 17.		Registry Law, 387.
"	" 387.	"		District Attorney, 833.
"	" 394.	" 2.		Findings, 575.
"	" 416.	"		Public Schools, 860.
1866.	" 210.	"		Elections, 861.
"	" 252.	"		Highways, 782.

STATUTES OF UNITED STATES.

Feb. 25, 1862. Legal Tender Notes, 487, 496.
 March 3, 1863. Gold Coin Contracts, 504.
 June 17, 1864. Gold Coin Contracts, 506.
 June 1864. Stamp Act, 546, 547, 557.
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STATUTE OF FRAUDS.

See GUARANTY, 5; SALE, 3, 4; VENDOR AND VENDEE, 1.

STATUTE OF LIMITATIONS.

See LIMITATIONS

STIPULATION.

1. STIPULATION TO EXTEND TIME—EFFECT OF.—Where a stipulation is signed by counsel, to stay execution for sixty days, provided the defendant pays one-half of the judgment in thirty days: *Held*, that this did not amount to an absolute extension of time. *Seawell v. Cohn*, 818.
2. IDEM.—To be binding upon the parties, a stipulation of counsel must be filed in the case and incorporated in the judgment, or in a separate order of the court.

See DEPOSITION, 8.

STOCK.

See CORPORATIONS, 1, 2; EQUITY, 11.

STOCKHOLDER.

See CORPORATION, 1 to 5.

SUMMONS.

1. SUMMONS, WHERE SERVED.—Where a judgment of a justice of the peace, whose jurisdiction was limited to a certain county, is offered in evidence to establish rights acquired under it, and where it appears that such judgment was taken by default, it is necessary to show affirmatively that the summons was served on the defendant within the territorial jurisdiction of the justice before it can be introduced in evidence. *Mallett v. Uncle Sam G. & S. M. Co.*, 156.
2. SUMMONS, HOW SERVED.—Service of summons on a corporation may be made by serving a copy of the same on the secretary of the company. *Gillig v. Independent M. Co.*, 206.
3. SERVICE OF SUMMONS—HOW PROVED.—The mere recital in a transcript from a justice's docket that defendant was duly served is not sufficient. Before the transcript can be admitted to establish the rights of one holding under the judgment of a justice, the facts in regard to the service of summons must appear.

SUPREME COURT UNITED STATES.

See APPEAL, 2, 3.

SURETY.

- SURETIES ON BOND—WHEN NOT DISCHARGED.—*Held*, that the stipulation in this case to extend time did not operate to discharge the sureties on the bond given to release property held under attachment. *Seawell v. Cohn*, 819.

SURVEY.

1. SURVEY—WHAT SUFFICIENT.—A survey, in which all the corners are marked and all the lines run and marked except the closing line between the first and last corner stake, is a legal survey under the Utah statutes. *Alford v. Devin*, 172.
2. IDEM—POSSESSION AND INCLOSURE.—Plaintiffs claiming the right of pos-

session under a survey, are not bound to show they inclosed the land within one year after the survey, when the defendants entered within the year. *Id.*

3. **SURVEY OF LAND—RIGHT OF POSSESSION.**—A survey of agricultural land, made in accordance with the provisions of section two hundred and sixty-one of an act entitled "An act to regulate surveyors and surveying," gives the person for whom such survey is made a right of possession for one year from the time the certificate is recorded. *Desmond v. Stone*, 320.

TAXES.

1. **TAXATION OF POSSESSORY RIGHTS TO MINING CLAIMS.**—Possessory rights to mining claims are property, and as such, taxable. *Hale & Norcross G. & S. M. Co. v. Storey County*, 83; *The People v. Taylor*, 88.
2. **IDEM.**—Taxation of the possessory right is not in violation of the section of the organic act which prohibits the territorial legislature from taxing the property of the United States. The object of the section was to protect the government, and not to prevent the taxation of settlers on public lands. *Id.*
3. **CAPITATION TAX NOT UNCONSTITUTIONAL.**—The revenue law of the State imposing a capitation tax of one dollar on all passengers carried out of the State by stage companies, is not a regulation of commerce among the States, nor a tax on exports, and is not in conflict with the powers of the federal government. *Ex parte Crandall*, 250.
4. **IDEM.**—There is no restriction upon the taxing power of a State, except the laying of imposts or duties on imports or exports, and if the exercise of this power foreign commerce, or commerce among the States, be incidentally affected, the State authority must nevertheless be maintained. *Id.*
5. **TAX ON PASSENGERS NOT A POLL TAX.**—The tax of one dollar levied on passengers leaving the State is not a poll tax, and does not conflict with the constitutional provision limiting the poll tax to four dollars. *Id.* 251.
6. **TAXES FOR SCHOOL PURPOSES DISCUSSED IN THE OPINION.**—*Trustees of School District No. 1 v. Commissioners of Ormsby Co.*, 283.
7. **TAXES COLLECTED WITHOUT AUTHORITY OF LAW.**—This court, in this proceeding, can make no order in regard to taxes collected without authority of law. *Id.* 288.
8. **TAXATION—PROPERTY SUBJECT TO ANNUAL TAX.**—All tangible property within the State of Nevada is subject to one and only one annual tax. Each acre of land, and each piece of coined money, is liable to this tax. But the property which was taxed in the hands of A., on the first Monday of May, could not subsequently, that year, be taxed in the hands of another. *State v. Earl*, 334.
9. **IDEM—TAX ON MONEY IS A TAX ON THE CHOSE IN ACTION.**—A tax on money at interest, secured by mortgage on land, is neither a tax on the pieces of money loaned, the land on which the mortgage security is taken, nor upon the paper on which the promise to pay is written. But it is a tax on the chose in action, or right to collect the debt. *Id.*
10. **CHOSE IN ACTION FOLLOWS THE PERSON.**—Chose in action follows the person of those having the right. When the holder of such right resides

out of the State of Nevada, this State has no jurisdiction over the person nor over the thing proposed to be taxed, and cannot tax either. *Id.*

11. **PROPERTY TAX OF WASHOE COUNTY.**—Two-thirds of the property tax of Washoe county must be placed in the general fund. The law provides how this fund shall be paid out. The commissioners have no authority to make a change in this respect. *People ex rel. Flack v. Commissioners of Washoe Co.*, 391.
12. **POLL TAX.**—Two-thirds of the poll tax must also be paid into the general fund; there is no authority for paying it all into the indigent sick fund. *Id.*
13. **TAXES ARE DEBTS.**—A judgment which is personal against the taxpayer, and in rem against real estate, is a debt within the purview of the act of Congress, which makes certain United States notes a legal tender for debts. *Rhodes v. O'Farrell*, 584. (*By Beatty, J.*)
14. **TAXES ARE NOT DEBTS.**—Taxes are not debts within the purview of the act of Congress referred to. *Id.* (*By Brosnan, J.*)
15. **JUDGMENT FOR TAXES BECOMES A DEBT.**—But if the State goes into court, and obtains a judgment for these taxes against the person of the taxpayer, this personal judgment becomes a debt, and like other debts may be discharged in paper. *Id.* (*By Brosnan, J.*)
16. **PROCEEDS OF MINES SUBJECT TO TAXATION.**—The products of mines are personal property, and as such, subject to taxation for municipal purposes. *City of Virginia v. Chollar-Potosi M. Co.*, 609.
17. **IDEM—PROPERTY REMOVED BEYOND CORPORATE LIMITS.**—All property within the municipality is subject to one annual taxation, and it makes no difference that it is removed beyond the corporate limits before the amount of tax is specified, or the mode of collecting established. *Id.*
18. **EQUALITY OF TAXATION.**—The Constitution requires that all *ad valorem* taxes shall be as nearly equal as may be: *Held*, that the mode of assessing the proceeds of mines does not violate that principle of equality. *Id.*
19. **PENALTY FOR REFUSING INFORMATION.**—The municipal authorities of the city of Virginia may add a penalty for refusing to give the assessor proper information to enable him properly to assess the products of a mine. *Id.*

See **ASSESSMENT**, 2; **CONSTITUTION**, 5, 6, 7.

TENANT IN COMMON.

1. **POSSESSION OF TENANT IN COMMON.**—Until there is some decisive act to show an ouster or adverse possession, the possession of one joint tenant, or tenant in common, inures to the benefit of all co-tenants. *Van Valkenburg v. Huff*, 115.
2. **POSSESSION OF TENANT IN COMMON.**—The possession of one partner or tenant in common inures to the benefit of all, until such possession becomes adverse. *Mallett v. Uncle Sam G. & S. M. Co.*, 157.
3. **IDEM.—EXPENSES—COURT OF EQUITY.**—If one partner or tenant in common, after having become associated with his copartners in the development of a mining claim, voluntarily leave it in the possession of his co-tenants, and refuses to bear his just proportion of the expenses incurred by them in the development of it, and should afterwards bring his

- action to recover his interest, upon a proper showing to the equity side of the court, relief would be refused until he had paid his full proportion of the expenses incurred in such development. *Id.*
4. TENANTS IN COMMON—EJECTMENT.—Tenants in common may join in an action to recover possession of the common property. *Alford v. Dewin*, 172.
 5. TENANT IN COMMON—REPLEVIN.—Where one tenant in common sells the right to a stranger to cut timber off the common property, another tenant in common of the same property cannot maintain replevin for the timber after it has been cut. *Alford v. Bradeen*, 191.
 6. TENANT IN COMMON—TITLE OF.—The instruction that "the title of a tenant in common is not paramount to that of his co-tenant," was calculated to mislead, and was therefore erroneous. *Hoopes v. Meyer*, 366.
 7. *IDEM.*—WHEN EXCUSED FROM PAYING RENT.—The expression that a tenant can only excuse himself from paying rent when evicted by paramount title, means that he can only excuse himself when he is kept out of possession by one who has a legal right to do so, and not a mere trespasser against whom he has his remedy. *Id.*
 8. *IDEM.*—WHEN LESSEE HAS NO REMEDY AGAINST.—If a party hold a lease from one of two tenants in common for certain premises, and the other tenant in common afterwards takes possession of a part of the common property, the lessee has no remedy against him, and will be entitled to an abatement *pro tanto* in his rent. *Id.*
 9. *IDEM.*—WHEN EVICTION BY, MAY BE SHOWN.—Evidence tending to show the defendant was kept out of possession of part of the leased premises by a tenant in common of the lessor, or his agent, should have been admitted. *Id.*
 10. TENANT IN COMMON—RIGHTS OF.—A tenant in common suing for only a part interest in the property cannot recover judgment for the whole. *Bullion M. Co. v. Croesus M. Co.*, 698.

See EJECTMENT, 9; MINING CLAIM, 9.

TERM OF COURT.

See JUDGMENT, 9.

THREATS.

THREATS—ADMISSIBILITY AND EFFECT OF.—Evidence of threats made by defendant may be proved not only to establish the killing, but when the killing is admitted, for the purpose of establishing motive or deliberation. When a threat is made against a party, unless he will do something which he fails to do, and the threat is afterwards executed, it would seem to be as conclusive as if it had not been connected with a condition. *State v. Bonds*, 775.

TIME.

See REASONABLE TIME,

TITLE.

See EJECTMENT, 1, 2.

TOLLS.

See ROAD, 2.

TORTS.

See ASSUMPSIT, 3.

TREASURY NOTES.

See MONEY, 2.

TRESPASS.

See EJECTMENT, 2.

TROVER.

See DAMAGES, 3.

TRUSTEES.

TRUSTEES—DUTY TO PROTECT PROPERTY.—If a trustee turns over the trust property to the custody of one who neglects to care for it properly, a court of equity will interfere to protect the property from waste. *Heyman v. Kelly*, 149.

See DEED, 2.

UTAH STATUTES.

See SURVEY, 1.

VENDOR AND VENDEE.

1. **PURCHASER—PROMISE TO PAY INCUMBRANCES.**—Where the purchaser of real property agrees with the vendor to pay certain incumbrances upon it, as a part of the consideration of the conveyance, the person holding such incumbrance, or the person to whom such payment is to be made, may maintain an action upon such promise or agreement. Such an understanding or promise does not come within the statute of frauds, and need not be in writing. *Ruhling v. Hackitt*, 308.

See CONTRACT, 5; EVIDENCE, 7, 8; JUDGMENT, 18.

VENUE.

WHEN AFFIDAVIT INSUFFICIENT TO CHANGE VENUE.—Affidavits which do not show that a fair and impartial trial cannot be had in the county where an action is brought, are not sufficient, under the twenty-first section of the practice act, to entitle a party to a change of venue. *Hale & Norcross G. & S. M. Co. v. Espartero G. & S. M. Co.*, 274.

See INSTRUCTIONS, 10.

VERDICT.

1. VERDICT CONTAINING SURPLUS MATTER.—When the verdict of a jury contains surplus matter, the court ought not for that reason to set it aside and grant a new trial, unless it appears from that surplus matter that the jury based their verdict on absurd reasoning or false premises. *Gregory v. Frothingham*, 211.
2. VERDICT—COURT MAY SUGGEST CORRECTION OF.—The court may always suggest to the jury a correction of their verdict as to form. *State v. Waterman*, 454.

See JURY, 3.

VOID INSTRUMENTS.

See APPEAL, 19; PLEADINGS, 15, 16.

WARDEN STATE PRISON.

See CONSTITUTION, 9.

WAIVER.

WAIVER OF RIGHTS.—Rights may be waived by express declaration of intention to waive a right, or some act equally indicative of such intention, or by some act or declaration which has induced another party to think he has waived his right, and induced the other party to act on that supposed waiver. *Killip v. Empire Mill Co.*, 559.

See NEW TRIAL, 6.

WATER RIGHTS.

1. WATER RIGHTS—PRIOR APPROPRIATION.—Where the right to the use of running water is based upon appropriation, and not upon an ownership in the soil, the first appropriator has the superior right. *Lobdell v. Simpson*, 783.
2. IDEM.—When a plaintiff claims water on the ground of prior appropriation: *Held*, error to refuse this instruction: "The plaintiff is not entitled to any greater quantity of the water of Desert Creek than he actually appropriated prior to defendant's appropriation." *Id.*
3. IDEM.—SUBSEQUENT APPROPRIATORS.—The first appropriator has the right to all water appropriated by him as against subsequent appropriators, and has the right to erect dams, divert water, etc., before any subsequent appropriation, but not to make any new dams or diversions of water to the damage of the subsequent appropriator, who has a right to have the water continue to flow as it flowed when he made his appropriation. *Id.*

WITNESS.

1. WITNESS—WHEN INCOMPETENT ON THE GROUND OF INTEREST.—The interest which will render a person incompetent as a witness must be a direct interest in the judgment; he must either gain or lose by the direct legal operation or effect of the judgment, or the record of it must be such as would make it legal evidence for or against him in some other action. *Geller v. Hufferker*, 22.

2. **ORDER EXCLUDING WITNESSES FROM COURT-ROOM—EFFECT OF.**—When an order is made excluding defendant's witness from the court-room, and some of the witnesses come in during the trial, they may discredit such witnesses, and subject them to punishment for contempt; but the defendant himself, not being in fault, is entitled to their testimony. *State v. Salge*, 831.

WRIT OF ERROR.

1. **WRIT OF ERROR, WHEN GRANTED.**—The cases enumerated in the twenty-fifth section of the judiciary act of Congress are the only ones in which a writ of error can issue to the supreme court of the United States. *Hamilton v. Kneeland*, 50.
2. **IDEM.**—Although it is not indispensable that the record should show by direct and positive statement that some of the questions enumerated in section twenty-five of the judiciary act was passed upon by the State court to authorize a writ of error to the supreme court of the United States, yet it must appear by just and necessary inference that some one of those questions were made, and that the court could not have arrived at the judgment pronounced by it without passing upon one or more of them. *Id.*

See JUDGMENT, 34.

WRIT OF PROHIBITION.

1. **WRIT OF PROHIBITION—WHEN MAY ISSUE.**—An order of prohibition may issue from this court in a proper case to arrest the progress of a trial. But such order should not issue when there is other and adequate remedy. *Lou v. Crown Point*, 599.
2. **IDEM—OFFICE OF THE WRIT.**—The office of such writ is not to correct errors, but to prevent courts transcending the boundaries of their jurisdiction. *Id.*

WRIT OF RESTITUTION.

AUTHORITY OF SHERIFF—WRIT OF RESTITUTION.—The sheriff has no authority to put a party in possession of land not described in complaint or judgment. *Bullion M. Co. v. Crassus M. Co.*, 637.







